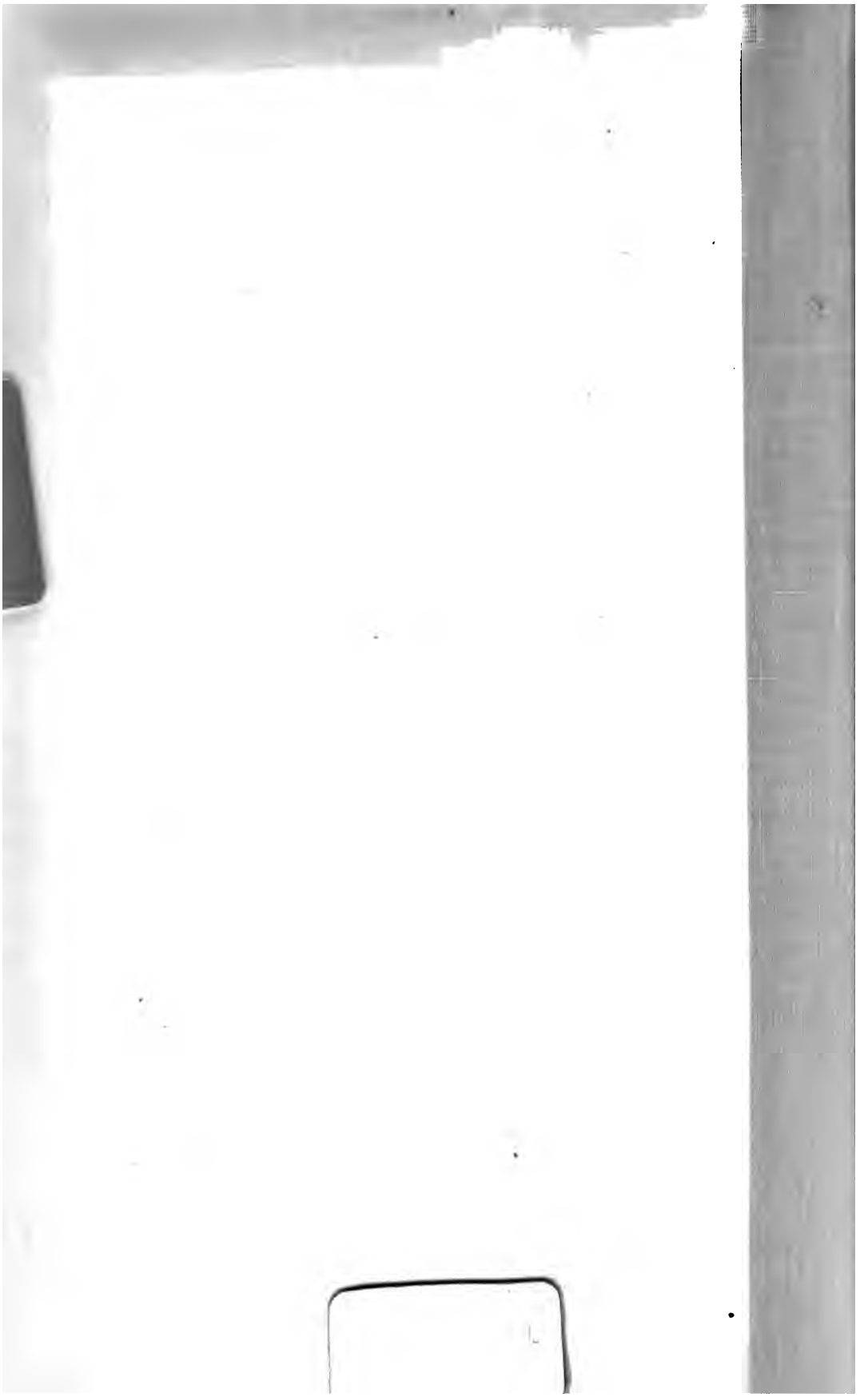

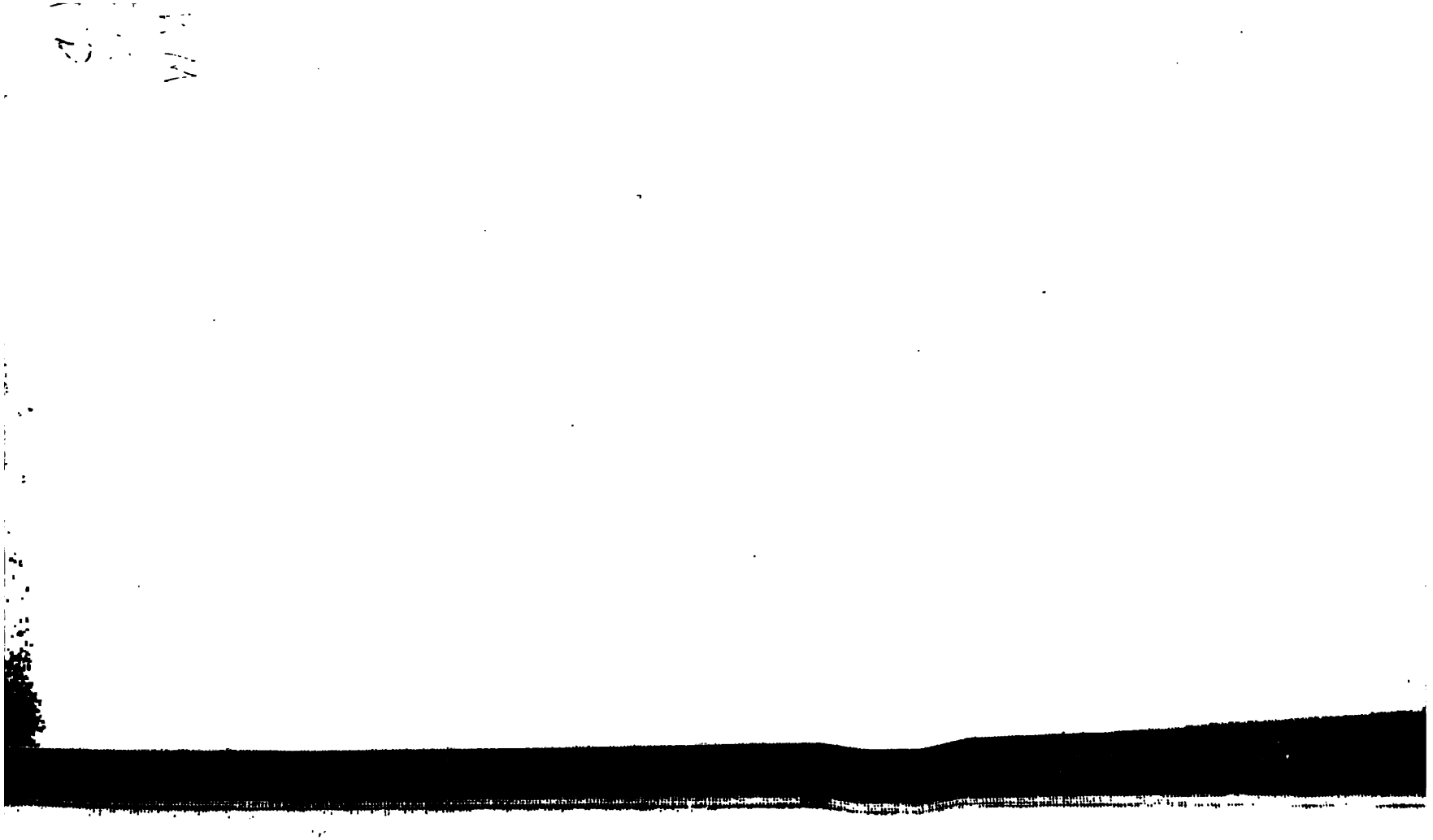

A TREATISE

ON THE

LAW OF SUITS BY ATTACHMENT

IN

THE UNITED STATES.

BY

CHARLES D. DRAKE, LL.D.,

RETIRED CHIEF JUSTICE OF THE UNITED STATES COURT OF CLAIMS.

SEVENTH EDITION,

REVISED, CORRECTED, AND ENLARGED;

WITH

AN APPENDIX,

CONTAINING THE LEADING STATUTORY PROVISIONS OF THE SEVERAL STATES AND TERRITORIES OF THE UNITED STATES, IN RELATION TO SUITS BY ATTACHMENT.

BOSTON:
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TO

MY BROTHER-IN-LAW,

ALEXANDER H. McGUFFEY, ESQ.,

OF CINCINNATI,

AS AN EXPRESSION OF ADMIRATION, RESPECT,

AND AFFECTION,

THIS WORK IS DEDICATED.

PREFACE TO THE SEVENTH EDITION.

When, in 1854, this work was first published, few things could have been farther from my expectation, than that it would in my lifetime, if ever, reach a seventh edition. But now, in the goodness of Providence, it is my privilege, at the age of fourscore years, to send forth this edition, and in doing so to become, so far as I could ascertain, the first American author who has edited seven editions of a Treatise of his own on any branch of civil jurisprudence.

This could not have been unless the book had acceptably met a want of the legal profession, and had, by use, grown in their estimation. That it has done both is shown, not only by the number of editions called for, but by the constant citation of it as authority, at the bar and in judicial opinions, all over the country, and by commendatory expressions toward it by many courts, both Federal and State, from the time the Supreme Court of the United States, in 1857, spoke of the first edition as "a well-considered treatise," down to the present day.[1]

Every call for a new edition inspired me to renewed effort to make the work more complete and reliable.

[1] Mattingly *v.* Boyd, 20 Howard, 128.

To that end, my labor on this edition has probably exceeded that on any previous one. In this connection I deem it not unfit to record here the statement, that from the hour I began, forty-four years ago, to collect materials for the book, down to the moment of handing this Preface to the printer, all the work on every part of the book, in every edition, has been wholly my own. Under my hand alone the book has grown — irresistibly grown to about three times its original size, in spite of liberal excisions; and the number of cases cited has increased from 1,185 to 5,100, and the number of citations of them from 1,835 to within a small fraction of 7,000.

I could easily have confined the book within smaller space, by leaving out statements of cases and giving merely results deduced from them; but, believing that the book would go into many places where few Reports could be found, I have sought to compensate, in some degree, for their absence by giving such statements freely. I have had no reason to suppose that my judgment in this respect was erroneous.

In the preparation of this edition I read, in the spirit of exacting criticism, the entire text of the Treatise, and was thereby enabled to discover and correct manifold imperfections of style, and also found a good many instances in which, clearly without detriment, matter could be omitted, and quite a number in which a change in the mode of presentation was desirable. And yet, after all, I cannot venture to claim that the book is free from defects and errors; but I feel confident that none of a serious character will appear.

From more than seven hundred new cases additional matter, equal to about fifty pages, has been gathered, and woven into the text; and yet, because of the amount omitted that was in the last edition, the number of pages in the Treatise is now *exactly the same* as in that.

Special work has been done in the enlargement and improvement of the Index, and the Appendix has been brought into conformity with the present attachment laws of the country.

Hoping that my professional brethren will concur with me in considering this edition much better than the last, I commit the book *finally* to them, with undiminished gratitude for the favor they have shown it in the past.

C. D. D.

WASHINGTON, D. C.,
July 1, 1891.

PREFACE TO THE FIRST EDITION.

THE necessity for a work on the law of Suits by Attachment in the United States occurred to me early in my professional life; but I shared the then prevalent impression of the Bar, that the Attachment Acts of the several States were so dissimilar as to baffle any attempt at a systematic treatise on that subject, based on the jurisprudence of the whole country and adapted for general use. Some years since, however, in preparing for the argument of a question of garnishment,[1] an examination of the Reports and legislation of a majority of the States satisfied me — and all subsequent researches have but confirmed the opinion — that the diversity in the statutes constituted in reality no impediment of any moment to the successful preparation of such a treatise. The purpose to prepare this volume was then formed, and has been prosecuted, at irregular intervals, in the midst of other and more pressing avocations, until the result is now submitted to the profession.

The value of the proceeding by attachment is everywhere asserted in the reported opinions of our higher State courts, and is universally and practically illustrated in the history of the Colonial, Territorial, and State legislation of this country. Among the early statutes enacted, have always been those authorizing the preliminary attachment of the property of debtors; and the general tendency has been, and is, to enlarge the

[1] In Marvin *v.* Hawley, 9 Missouri, 382.

scope and increase the efficiency of this remedy. Upon these grounds alone the importance of this subject might, if necessary, be amply vindicated; but on that point no doubt has at any time disturbed the prosecution of my task. My conviction is, that on no branch of the law is a treatise more needed by the profession in this country than on this; and it is gratifying to know that such is the general opinion of my professional brethren, wherever the proposed preparation of this work has been known. It is now to be decided whether this attempt to supply an acknowledged need will be regarded with equal favor.

The materials here wrought together are almost wholly *American*. Great Britain, the fountain of, and exercising continually a marked influence over, our jurisprudence generally, contributes in this department comparatively nothing. In that country, the limited proceeding under the custom of London gives rise to few cases which find their way into the courts of Westminster Hall. Here, however, the universal use of this remedy fills our Reports with cases presenting every variety of questions, and the lapse of time and the accumulation of adjudications seem to make no sensible diminution in the annual number of reported cases, nor any great difference in their novelty or their interest. Hence a work of this description reflects in a high degree a legal system and a branch of jurisprudence peculiarly our own; and I confess to somewhat of satisfaction at being instrumental in presenting to the Bar of the United States a volume which, without intentionally slighting what is to be found in the English Reports on the subject, may be justly claimed to be thoroughly American. . . .

CHARLES D. DRAKE.

St. Louis, Missouri, July 1, 1854.

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A TREATISE

ON THE LAW OF

SUITS BY ATTACHMENT

IN

THE UNITED STATES.

THE

LAW OF SUITS BY ATTACHMENT.

CHAPTER I.

ORIGIN, NATURE, AND OBJECTS OF THE REMEDY BY ATTACHMENT.

§ 1. THE preliminary attachment of a debtor's property, for the eventual satisfaction of the demand of a creditor, is unquestionably a proceeding of great antiquity. Whether the statement of Mr. Locke, in his Treatise on the Law of Foreign Attachment in the Lord Mayor's Court of London, ascribing its origin to the Roman law, be capable of exact verification, need not now detain us.[1] It is sufficient for the present purpose, that, so far as its use in the United States is concerned, we have no difficulty in finding its origin in the custom of Foreign Attachment of London, which is agreed by all authorities to have a very ancient existence. This, with other customs of that city, has, from time to time, been confirmed by Royal Charters and Acts of Parliament, and is declared "never to become obsolete by non-user or abuser." It is a singular incident of those customs, that "they may be and are certified and are recorded by word of mouth; and it is directed that the mayor and aldermen of the city, and their successors, do declare by the Recorder whether the things under dispute be a custom or not, before any of the King's justices, without inquest by jury, even though the citizens themselves be parties to the matter at issue; and being once recorded, they are afterwards judicially noticed."[2] We accordingly find

[1] The following passage in Adam's Roman Antiquities, by Wilson, p. 194, is probably that to which Mr. Locke refers as sustaining his position: "It was unlawful to force any person to court from his own house, because a man s house was esteemed his sanctuary (*tutissimum refugium et receptaculum*). But if any lurked at home to elude a prosecution (*si fraudationis causâ latitaret*, Cic. Quint. 19), he was summoned (*evocabatur*) three times, with an interval of ten days between each summons, by the voice of a herald, or by letters, or by the edict of the prætor; and if he still did not appear (*se non sisteret*), the prosecutor was put in possession of his effects."

[2] Locke on Foreign Attachment, XVI.

the custom of Foreign Attachment certified by Starkey, Recorder of London, as early as 22 Edward IV. to be: "That if a plaint be affirmed in London, before, &c., against any person, and it be returned *nihil*, if the plaintiff will surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnishment against him, to warn him to come in and answer whether he be indebted in the manner alleged by the other; and if he comes and does not deny the debt, it shall be attached in his hands, and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt; and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other, after execution sued out by the plaintiff."

§ 2. The custom thus set forth was, it is believed, first treated of in an orderly manner by Mr. Bohun, in a work entitled "Privilegia Londini: or the Rights, Liberties, Privileges, Laws, and Customs of the City of London;" of the third edition of which a copy, printed in 1723, is before me; in which the author remarks: "It may be here observed, that altho' the Charters of the City of London (as they are here recited by 15 Car. II.) do begin with those of William I., yet it must not be understood as if any of the city rights, liberties, or privileges were originally owing to the grants of that prince. For, 't is evident, the said City and Citizens had and enjoyed most of the liberties and privileges mentioned in the following charters (besides divers others not therein enumerated) by immemorial usage and custom long before the arrival of William I."

§ 3. This custom, notwithstanding its local and limited character, was doubtless known to our ancestors, when they sought a new home on the Western continent, and its essential principle, brought hither by them, has, in varied forms, become incorporated into the legal systems of all our States; giving rise to a large body of written and unwritten law, and presenting a subject of much interest to legislatures and their constituents, as well as to the legal profession and their clients. Our circumstances as a nation have tended peculiarly to give importance to a remedy of this character. The division of our extended domain into many different States, each limitedly sovereign within its territory, inhabited by a people enjoying unrestrained privilege of transit from place to place in each State, and from State to State; taken in connection with the universal and unexampled

expansion of credit, and the prevalent abolishment of imprisonment for debt; would naturally, and of necessity, lead to the establishment, and, as experience has demonstrated, the enlargement and extension, of remedies acting upon the property of debtors. The results of this tendency, in the statute law of the several States, may be discovered by reference to their leading statutory provisions, as found in the Appendix; while those connected with the judicial administration of the law appear in the succeeding chapters of this work.

§ 4. In its nature this remedy is certainly anomalous. As it exists under the custom of London, it has hardly any feature of a common-law proceeding. At common law the first step in an action, without which no other can be taken, is to obtain service of process on the defendant; under the custom, this is not only not done, but it was declared by Lord Mansfield, that the very essence of the custom is that the defendant shall not have notice. At common law a debtor's property can be reached for the payment of his debt, only under a *fieri facias;* under the custom, it is subjected to a preliminary attachment, under which it is so held as to deprive the owner of control over it, until the plaintiff's claim be secured or satisfied. At common law only tangible property can be subjected to execution; under the custom, a debt due to the defendant is attached, and appropriated to the payment of his debt. At common law, after obtaining judgment, the plaintiff is entitled to execution without any further act on his part; under the custom, he cannot have execution of the garnishee's debt, without giving pledges to refund to the defendant the amount paid by the garnishee, if the defendant, within a year and a day, appear and disprove the debt for which the attachment is obtained.

In these and other respects the proceeding under the custom has an individuality entirely foreign to the common law. Its peculiar features have in the main been preserved in its more enlarged and diversified development in this country. The most material differences as it exists among us, are, the necessity of notice to the defendant, either actual or constructive; the direct action of the attachment on tangible property, as well as its indirect effect upon debts, and upon property in the garnishee's hands; the necessity for the presentation of special grounds for resort to it; and the requirement of a cautionary bond, to be executed by the plaintiff and sureties, to indemnify the defendant against damage resulting from the attachment. Still the

remedy is, with us, regarded and treated as *sui generis*, and is practically much favored in legislation, though frequently spoken of by courts as not entitled to peculiar favor at their hands.

§ 4 *a*. Nothing more distinctly characterizes the whole system of remedy by attachment, than that it is — except in some States where it is authorized in chancery — a special remedy at *law*, belonging exclusively to a court of law, and to be resorted to and pursued in conformity with the terms of the law conferring it; and that where, from a conflict of jurisdiction, or from other cause, the remedy by attachment is not full and complete, a court of equity has no power to pass any order to aid or perfect it.[1]

§ 5. Under the custom, and likewise in this country, attachment is in the nature of, but not strictly, a proceeding *in rem*; since that only is a proceeding *in rem* in which the process is to be served on the thing itself, and the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever.[2] The original object of the London proceeding was by attachment of the defendant's property instead of his body, to compel his appearance by sufficient sureties to answer the plaintiff's demand.[3] The practice of summoning him at the commencement of the proceeding, if it ever prevailed, was, in all probability, found to interfere with the advantage intended to be given by the attachment, and was, therefore, discontinued; but though the defendant is in fact never summoned, still the record of the proceedings in the Mayor's court must contain the return of *nihil*, or it will be erroneous and void.[4] All the notice, therefore, which the defendant there has of the proceeding, is derived through the attachment of his property; and herein is the leading difference between the London proceeding and ours. With us, the writ of attachment is always accompanied or preceded by a summons, which, if practicable, is served on the defendant; if not, he is notified by publication of the attachment of his property. If the summons be served and property be at-

[1] McPherson *v.* Snowden, 19 Maryland, 197; Lackland *v.* Garesché, 56 Missouri, 267; Godding *v.* Pierce, 13 Rhode Island, 532; Phillips *v.* Ash, 63 Alabama, 414; Henderson *v.* Ala. G. L. I. Co., 72 Ibid. 32; Bachman *v.* Lewis, 27 Missouri Appeal, 81.

[2] Mankin *v.* Chandler, 2 Brockenbrough, 125; Megee *v.* Beirne, 39 Penn. State, 50; Bray *v.* McClury, 55 Missouri, 128.

[3] Ashley on Attachment, 11.

[4] Locke on Foreign Attachment, 12.

tached, the latter, unless special bail be given, is held for the payment of such judgment as the plaintiff may recover, and that judgment is *in personam*, authorizing execution against any property of the defendant, whether attached or not. If the summons be served, but no property attached, the suit proceeds as any other in which the defendant has been summoned, unaffected by its connection with a fruitless attachment. If property is attached, but there be no service on the defendant, and he do not appear, publication is made, which brings the defendant before the court for all purposes, except the rendition of a *personal* judgment against him;[1] and the cause proceeds to final judgment, but affects only what is attached;[2] and the judgment will not authorize an execution against any other property, nor can it be the foundation of an action against the defendant;[3] nor

[1] King *v.* Vance, 46 Indiana, 246.

[2] Kilburn *v.* Woodworth, 5 Johnson, 37; Lincoln *v.* Tower, 2 McLean, 473; Westervelt *v.* Lewis, Ibid. 511; Phelps *v.* Holker, 1 Dallas, 261; Chamberlain *v.* Faris, 1 Missouri, 517; Massey *v.* Scott, 49 Ibid. 278; Downer *v.* Shaw, 2 Foster, 277; Maxwell *v.* Stewart, 22 Wallace, 77; Miller *v.* Dungan, 36 New Jersey Law, 21; Coleman's Appeal, 75 Penn. State, 441; Fitzsimmons *v.* Marks, 66 Barbour, 333; Force *v.* Gower, 23 Howard Pract. 294; Clymore *v.* Williams, 77 Illinois, 618.

[3] In Cooper *v.* Reynolds, 10 Wallace, 308, the Supreme Court of the United States said: "If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

"That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the property is exhausted. No suit can be maintained on such a judgment in the same court or any other, nor can it be used in evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court." See Westervelt *v.* Lewis, 2 McLean, 511; Thompson *v.* Emmert, 4 Ibid. 96; Chamberlain *v.* Faris, 1 Missouri, 517; Clark *v.* Holliday, 9 Ibid. 711; Steel *v.* Smith, 7 Watts & Sergeant, 447; Kilburn *v.* Woodworth, 5 Johnson, 37; Robinson *v.* Ward, 8 Ibid. 86; Pawling *v.* Bird, 13 Ibid. 192; Phelps *v.* Baker, 60 Barbour, 107; White *v.* Floyd, Speers Eq. 351; Manchester *v* McKee, 9 Illinois (4 Gilman), 511; Miller *v.* Dungan, 36 New Jersey Law, 21; Fitzsimmons *v.* Marks, 66 Barbour, 333; Oakley *v.* Aspinwall, 4 Comstock, 514; Boswell *v.* Otis, 9 Howard Sup. Ct. 336; D'Arcy *v.* Ketchum, 11 Ibid. 165; Webster *v.* Reid, Ibid. 437; Erwin *v.* Heath, 49 Mississippi, 795; Bliss *v.* Heasty, 61 Illinois, 338; Earth-

can the plaintiff take judgment for a greater amount than that for which the attachment issued,[1] nor for any other cause of action than that stated in the publication.[2] If there be neither service upon the defendant nor attachment of his property, there is nothing for the jurisdiction to rest upon, and any proceedings taken in the cause are *coram non judice* and void;[3] even though the statute law of the State expressly authorize a judgment to be rendered against a defendant under such circumstances.[4] Another essential difference between the two proceedings is, that while under the custom the defendant cannot appear and defend the action without entering special bail, such is not the case with us. Here it is optional with him to give security for the payment of the debt or not; but in either event he is generally allowed to appear and defend. If he give the security, the same result follows as under the custom, — the dissolution of the attachment, the release of the attached property, and the discharge of the garnishee;[5] if not, the property is the security, and remains in custody.

§ 6. Under the custom, the only preliminary affidavit to be made by the plaintiff, in order to his obtaining the attachment, is, that the defendant is indebted to him in a specified sum. In this country, he is generally required to swear as well to the defendant's indebtedness or liability as to some certain fact designated by statute as a ground for obtaining the writ. Wherever this is requisite, it is the foundation of the exercise of jurisdiction through this process, and without it no legal step can be taken. The facts necessary to be sworn to are of great variety, and embrace many different phases of the same general allegations; having relation mainly to the residence of the defendant, and to proceedings on his part to avoid the service of process, or to dispose of his property adversely to his obligations to his creditors, and giving rise to a great variety of questions of gen-

man *v.* Jones, 2 Yerger, 484; Moore *v.* Gennett, 2 Tennessee Ch'y, 375; Wilson *v.* Spring, 38 Arkansas, 181.

[1] Post, § 449 *a*.

[2] Janney *v.* Spedden, 38 Missouri, 395.

[3] Post, § 449; Eaton *v.* Badger, 33 New Hamp. 228; Carleton *v.* Washington Ins. Co., 35 Ibid. 162; Hopkirk *v.* Bridges, 4 Hening & Munford, 413; Miller *v.* Sharp, 3 Randolph, 41; Austin *v.* Bodley, 4 Monroe, 434; Maude *v.* Rodes, 4 Dana, 144; Hunt *v.* Johnson, Freeman, 282; Johnson *v.* Johnson, 26 Indiana, 441; Ward *v.* McKenzie, 33 Texas, 297; Judah *v.* Stephenson, 10 Iowa, 493; Morris *v.* U. P. R. Co., 56 Ibid. 135; Phelps *v.* Baker, 60 Barbour, 107; Cochran *v.* Fitch, 1 Sandford Ch'y, 142; Clymore *v.* Williams, 77 Illinois, 618; Borders *v.* Murphy, 78 Ibid. 81.

[4] Pennoyer *v.* Neff, 95 United States, 714.

[5] See Chap. XIII.

eral law and legal practice. And, as experience has prompted, the grounds of attachment have been multiplied, until, in some States, there would hardly seem to be much more needed in this respect, unless, as in New England, preliminary attachment should be a matter of right in every action *ex contractu*. At the same time the scope of the remedy, as to the causes of action for which it will lie, has been extended, and liberal provision has been made in a number of the States, for proceeding upon demands not due in cases where a postponement of remedy until their maturity would endanger their collection.

§ 7. The tendency is not only to widen the sphere, but to enlarge the operation of the remedy, by subjecting to attachment interests in, and descriptions of, property not heretofore subject to execution at common law. Under the custom, as before remarked, the attachment reaches only the garnishee's debt to the defendant; while universally, with us, it acts also, by direct levy, on the defendant's tangible property, real and personal. With us, too, generally, equitable interests in real estate may be attached; and recent legislation in several States authorizes the attachment, both directly and by garnishment, of *choses in action*, and the seizure of books of accounts, and the subjection of accounts and evidences of debt, by collection through a receiver, or other agent of the court, to the payment of the defendant's debt. At the same time there is a more extended disposition manifested to give to garnishment — what it has under the custom — a prospective operation upon effects coming into the garnishee's hands between the time of service on him and the time of filing his answer.

§ 8. The natural result of the matters thus briefly noticed is to give this remedy a high practical importance, and to lead to a voluminous mass of judicial decisions, extending over a wider surface, and bringing into view a greater variety of legal doctrines, than would be conjectured by those who have not examined the subject. In relation to it there can, in the nature of our institutions, be no uniform system of statute law; but notwithstanding the inevitable diversity in this particular, there is a general unity of aim and result; so that principles and rules of identical import may be — and in numberless instances are — judicially established, under statutes widely differing in details. Indeed, it may be questioned whether there is any other subject of equal extent, in the administration of the law, depend-

ing so entirely upon, and so exclusively regulated by, statutory provisions, that would exhibit less diversity of judicial decision than is connected with this.

With these general remarks we proceed to the practical consideration of the subject.

[8]

CHAPTER II.

FOR WHAT CAUSE OF ACTION AN ATTACHMENT MAY ISSUE.

§ 9. By the custom of London all attachments are grounded on actions of debt.[1] And the debt must be of such a nature as will sustain an action at law. Equitable debts, therefore, are not sufficient to ground an attachment upon; such, for instance, is a legacy, which is recoverable only in the spiritual court or in a court of equity. Dividends due to a creditor from the assignees under a commission of bankruptcy, are also in the same predicament, as is all trust property, for the creditor cannot sue for these at law, but must either petition the chancellor, or file a bill in equity to recover them. The debt also must be due, or it cannot sustain an attachment. Thus no attachment can be made upon a bond, bill, or note, the day of payment whereof is not yet come, nor for a book debt for payment of which time has been given, until such time be elapsed.[2]

§ 10. In this country, except in New England, resort to this process was formerly almost exclusively restricted to *creditors;* but now, as an examination of the Appendix will show, the range of cases in which it may be used is greatly enlarged over almost the entire country. Nevertheless, in the absence of statutory provision allowing attachments to issue in actions founded on *tort*, it has been uniformly held, that in such actions it will not lie. Thus, it cannot issue in an action of trover,[3] or trespass;[4] nor for a malicious prosecution;[5] nor for assault and battery;[6] nor to recover the amount of expenses incurred for medical and surgical services, and loss of time during confinement, re-

[1] Privilegia Londini, 254.

[2] Ashley on Attachment, 21, 22. In New York it was held, that the remedy by attachment could not be resorted to in equitable actions. Ebner *v.* Bradford, 3 Abbott Pract. N. s. 248.

[3] Marshall *v.* White, 8 Porter, 551; Hynson *v.* Taylor, 3 Arkansas, 552; Hutchinson *v.* Lamb, Brayton, 234.

[4] Ferris *v.* Ferris, 25 Vermont, 100; Tabor *v.* Big P. C. S. M. Co., 14 Federal Reporter, 636.

[5] Stanly *v.* Ogden, 2 Root, 259; Hynson *v.* Taylor, 3 Arkansas, 552; Tarbell *v.* Bradley, 27 Vermont, 535.

[6] Minga *v.* Zollicoffer, 1 Iredell (Law), 278; Thompson *v.* Carper, 11 Humphreys, 542.

sulting from a wound inflicted by the defendant;[1] nor for damages alleged to have been sustained by the plaintiff in consequence of a wrongful sale of his property under execution;[2] nor for damages caused by a collision between two steamboats;[3] nor for damages sustained by a steamboat running into and destroying a house;[4] nor to recover from common carriers damages for the loss of a trunk, where the declaration is in *tort* and not in contract;[5] nor for money stolen by the defendant;[6] nor for breach of marriage promise;[7] nor for damages for the alleged wrongful and fraudulent act of the defendant, in breaking open a letter intrusted to his care;[8] nor for alleged fraud committed by the defendant in the sale of personal property;[9] nor to recover a loss of profits resulting from the defendant's not selling and investing in a return cargo, a quantity of flour shipped to him;[10] nor for the recovery of specific property;[11] nor for the destruction by fire of plaintiff's property, caused by the defendant's carelessly and negligently setting fire to neighboring prairie grass;[12] nor for the recovery of the statutory forfeiture for taking usurious interest;[13] nor for slander, under a statute authorizing an attachment for torts, trespasses, or injuries actually done to property, real or personal.[14] In all such cases, though the plaintiff, in his affidavit for obtaining the attachment, allege a cause of action founded on contract, yet if it should appear, either from the declaration or the evidence, that the true cause of action is not of that character, it is the duty of the court to dismiss the suit.[15]

[1] Prewitt *v.* Carmichael, 2 Louisiana Annual, 943.

[2] Greiner *v.* Prendergast, 3 Louisiana Annual, 376.

[3] Swagar *v.* Pierce, 3 Louisiana Annual, 435; Griswold *v.* Sharpe, 2 California, 17.

[4] Holmes *v.* Barclay, 4 Louisiana Annual, 63; McDonald *v.* Forsyth, 13 Missouri, 549. See Irish *v.* Wright, 12 Robinson (La.), 563; Hill *v.* Chatfield, 4 Louisiana Annual, 562.

[5] Porter *v.* Hildebrand, 14 Penn. State, 129. See Strock *v.* Little, 45 Ibid. 416; Coleman's Appeal, 75 Ibid. 441.

[6] Piscataqua Bank *v.* Turnley, 1 Miles, 312.

[7] Maxwell *v.* McBrayer, Phillips, 527.

[8] Raver *v.* Webster, 3 Iowa, 502.

[9] Fellows *v.* Brown, 38 Mississippi, 541.

[10] Warwick *v.* Chase, 23 Maryland, 154.

[11] Hanna *v.* Loring, 11 Martin, 276.

[12] Handy *v.* Brong, 4 Nebraska, 60.

[13] Reed *v.* Beach, 2 Pinney, 26.

[14] Sargeant *v.* Helmbold, Harper, 219; Baune *v.* Thomassin, 6 Martin, N. S. 563.

[15] Elliott *v.* Jackson, 3 Wisconsin, 649. The restriction of the remedy by attachment to creditors is of course dependent on the terms of the governing statute; which may be, and in some States are, apparently sufficiently comprehensive to authorize an attachment in an action founded on tort. For instance, in New York, under its Code of Procedure, allowing an attachment "in an action *for the recovery of money*," the question arose whether those words authorized an attachment in an action for a wrong; and, as is the case in regard to many subjects which have come before the courts of that State, we find reported decisions *on both*

§ 11. Before proceeding to the main subject of inquiry, it may be remarked, that, in the absence of any statutory provision to the contrary, non-residents as well as residents may avail themselves of the proceeding by attachment.[1] And where the remedy is allowed only to residents, and the non-residence of the plaintiff does not appear on the face of the proceedings, the defendant can avail himself of it only by a plea in abatement.[2]

§ 12. Who may be regarded as a *creditor*, may be often a debatable question. A creditor is defined by a recent writer to be one who has a right to require of another the fulfilment of a contract or obligation.[3] Another writer considers a creditor to be one who gives or has given credit to another; one who trusts another; one to whom a debt is due: in a larger sense, one to whom any obligation is due.[4] Webster defines the word thus: "A person to whom a sum of money or other thing is due, by obligation, promise, or in law." In the Civil Law, he is said to be a debtor, who owes reparation or damages for the non-performance of his contract;[5] and of necessity he is a creditor

sides, with, as yet, no final adjudication by the court of last resort. In 1850, in Hernstien *v.* Matthewson, 5 Howard Pract. 196, in the Supreme Court, EDMONDS, J. decided that the Code allowed an attachment against a non-resident defendant in every action, whether for a wrong or on contract. In 1859, in Gordon *v.* Gaffey, 11 Abbott Pract. 1, HOGEBOOM, J. held that an attachment did not lie in an action for setting fire to the barn of the plaintiff, whereby the same, with all its contents, was consumed. In 1860, in Floyd *v.* Blake, 11 Abbott Pract. 349, JAMES, J. sustained an attachment in an action for assault and battery. In 1865, in Shaffer *v.* Mason, 29 Howard Pract. 55, 18 Abbott Pract. 455, INGRAHAM, SUTHERLAND, and CLARKE, JJ. decided that an attachment would not lie in an action of trespass *de bonis asportatis*. In 1866, the Supreme Court, at General Term, held, that an attachment would not lie in an action founded on tort. Saddlesvene *v.* Arms, 32 Howard Pract. 280. This decision was given after the Code of New York had been amended so as to authorize an attachment "in an action for the recovery of *the* money." Since this decision was rendered, the Code has been further amended so as to authorize the remedy "in an action arising on contract for the recovery of money only;" which leaves no room for using it in actions founded on tort. In Ohio, an attachment may issue "in a civil action for the recovery of money," when the defendant has "fraudulently or *criminally* contracted the debt or incurred the obligation for which suit is about to be or has been brought;" and it was there held, that the term "obligation" there is equivalent to *liability*, and that an attachment would lie in an action for damages for an assault and battery. Sturdevant *v.* Tuttle, 22 Ohio State, 111; Creasser *v.* Young, 31 Ibid. 57.

[1] Woodley *v.* Shirley, Minor, 24; Tyson *v.* Lansing, 10 Louisiana, 444; Posey *v.* Buckner, 3 Missouri, 413; Graham *v.* Bradbury, 7 Ibid. 281; McClerkin *v.* Sutton, 29 Indiana, 407; Mitchell *v.* Shook, 72 Illinois, 492; Givens *v.* Merchants' Nat. B'k, 85 Ibid. 442; Gray *v.* Briscoe, 6 Bush, 687; Ward *v.* McKenzie, 33 Texas, 297.

[2] Calhoun *v.* Cozzens, 3 Alabama, 21.

[3] 1 Bouvier's Law Dictionary, 383.

[4] 1 Burrell's Law Dictionary, 301.

[5] Hunt *v.* Norris, 4 Martin, 517; 1 Pothier on Obligations, 159.

who has the right to claim such reparation or damages. The word is certainly susceptible of latitudinous construction, and it is not perhaps as important here to arrive at its general meaning, as to ascertain the views of it, and of what constitutes an indebtedness, which have received judicial sanction, in connection with the resort to attachment.

§ 13. In New York, where the plaintiff was required to swear that the defendant is *indebted* to him, the court said it did not follow that the demand is to be so certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation without the intervention of a jury. Being *indebted* is synonymous with *owing;* it is sufficient, therefore, if the demand arise on contract. It was therefore held that an attachment would lie in an action founded on a bill of lading, whether the goods shipped were not delivered, or were delivered in a damaged condition.[1]

§ 13 *a.* In Connecticut, where the remedy is confined to "creditors," it was held, that it was available for the recovery of a claim for unliquidated damages for the negligence of the defendants in towing a raft of logs from New York to New Haven, through Long Island Sound, which the defendants had agreed to tow safely; whereby the raft was broken up and the logs scattered, and a large part lost, or recovered at a great expense.[2]

§ 14. In Pennsylvania, under a statute which, by a strict and literal construction, confined the writ of attachment to cases of debt, the following case arose. The defendant bound himself to deliver to the plaintiff teas of a certain quality, and suited to a particular market; and on failure to do so, to pay the difference between teas of such quality and such as should be delivered. Teas agreeably to contract were not delivered; and the plaintiff commenced suit by attachment, swearing that the difference amounted to $4,500. It was held, that this was a debt within the meaning of the statute, for which an attachment would lie. "It is not every claim," said the court, "that, upon a fair construction of this law, or even in common parlance, can be denominated a debt. For, in the first place, the demand must arise out of a contract, without which no debt can be created; and the measure of the damages must be such as the plaintiff can aver

[1] Lenox *v.* Howland, 3 Caines, 323; *In re* Marty, 3 Barbour, 229.

[2] New Haven Saw-Mill Co. *v.* Fowler, 28 Conn. 103.

to be due; without which special bail cannot regularly be demanded." [1] If, upon the facts sworn to, a contract does not appear, or cannot be necessarily implied, an attachment will not lie.[2]

§ 15. In Maryland, under a statute requiring the plaintiff to make oath that the defendant is *bona fide* indebted to him, it was held, that the term "indebted" was not to be construed in a technical or strict legal sense; but that where the contract sued upon furnished a standard by which the amount due could be so clearly ascertained as to enable the plaintiff to aver it in his affidavit, or the jury, by their verdict, to find it, an attachment might issue.[3]

§ 16. In Virginia, A. deposited with B., on storage, a quantity of flour, to be redelivered on demand. B.'s warehouse took fire, and, with the flour, was consumed. A. sued by attachment in chancery, to recover the value of the flour. It was objected that the court had no jurisdiction, because the claim was not a debt; but the Court of Appeals overruled the objection and sustained the proceeding.[4]

§ 17. In Alabama, where the statute used the words "debt or demand," and required the plaintiff "to swear to the amount of the sum due," it was held, that an action might be commenced by attachment, to recover for a breach of warranty of the soundness of a slave; the damage for the breach of warranty being the value of the slave at the time of the warranty, and a sum capable of ascertainment, and of which the plaintiff might make affidavit; and the cause of action arising out of contract, and the measure of the damages being ascertained by the law of the contract.[5] In the same State, under another provision, authorizing one non-resident to sue another non-resident by attachment, where the defendant is *indebted* to the plaintiff, either by judgment, note, or otherwise, it was held, that those terms did not extend beyond causes of action for which either debt or *indebitatus assumpsit* would lie.[6]

[1] Fisher v. Consequa, 2 Washington, C. C. 382. See Redwood v. Consequa, 2 Browne, 62; Carland v. Cunningham, 37 Penn. State, 228; Rauch v. Good, 1 Legal Chronicle R. 51.

[2] Jacoby v. Gogell, 5 Sergeant & Rawle, 450; Boyer v. Bullard, 102 Penn. State, 555.

[3] Wilson v. Wilson, 8 Gill, 192. See Warwick v. Chase, 23 Maryland, 154; Dunn v. Mackey, 80 California, 104.

[4] Peter v. Butler, 1 Leigh, 285.

[5] Weaver v. Puryear, 11 Alabama, 941.

[6] Hazard v. Jordan, 12 Alabama, 180.

§ 18. In Mississippi, where the "creditor" was required "to make oath to the amount of his debt or demand," it was held that an attachment would lie to recover damages for a breach of covenant.[1]

§ 19. In Louisiana, under a statute which authorized an attachment to issue "whenever a petition shall be presented for the recovery of a debt," an action was brought by attachment to recover the value of certain goods shipped on a steamboat, and not delivered according to the terms of the bill of lading; and the case was considered to be within the statute; the court holding that any obligation arising from contract, express or implied, either for the payment of money or the delivery of goods, creates a debt on the part of the obligor, for which an attachment may issue, whenever the amount may be fairly ascertained by the oath of the obligee.[2]

In the same State, an attachment was sustained in an action by the purchaser against the vendor of a slave, alleged to have absconded from the plaintiff, and to have returned to the vendor, who harbored him and refused to give him up, to recover the value of the slave, and of his services during his detention, and damages for expenses incurred in demanding him, and for counsel fees; the court holding that the retention of the slave was a violation of the contract of sale, and that the responsibility thereby incurred was not diminished by an outrage, perhaps a crime, being superadded to it.[3] The law under which the writ was sued out in this case was Art. 242 of the Louisiana Code of Practice, in these words: "The property of a debtor may be attached in the hands of third persons by his creditors, in order to secure the payment of a debt, whatever may be its nature, whether the amount be liquidated or not, provided the term of payment have arrived, and the creditor who prays the attachment state expressly and positively the amount which he claims;" and Art. 243 requires the creditor to "declare under oath the amount of the sum due him." Under this law an attachment was sustained in favor of the owner of a ship, against the owner of a dock, for failure to fulfil a contract by the latter for the services of his dock for the use of the plaintiff's ship.[4] In the same State it was held, that an attachment might be sued

[1] Woolfolk *v.* Cage, Walker, 300.
[2] Hunt *v.* Norris, 4 Martin, 517.
[3] Crane *v.* Lewis, 4 Louisiana Annual, 320.
[4] Hyde *v.* Higgins, 15 Louisiana Annual, 1.

out, to recover the value of books delivered to the defendant to be bound, and which he failed to return.[1] And again, under a statute authorizing an attachment "in every case where the debt, damages, or demand is ascertained and specified," it was decided that attachment would lie to recover damages sustained by the malfeasance of one in the employ of the plaintiff, whose good conduct the defendant had guaranteed.[2]

§ 20. In Arkansas, where an attachment was allowed when any person "is indebted," it was held that the term "indebted" is synonymous with *owing*, and that attachment might be maintained upon an unliquidated as well as a liquidated demand, arising *ex contractu*, that might be rendered certain. The case was an action for damages for breach of a contract to tow a boat up Red River, and deliver certain loads of corn at certain places specified in the contract.[3]

§ 21. In Indiana, under a statute authorizing attachment for "debts or other demands," it was decided, that a claim for damages for an injury to flour, while in possession of the defendant as a common carrier, and in the course of transportation, was a cause of action for which an attachment would lie.[4]

§ 22. In Michigan, the statute authorized an attachment, upon an affidavit being made that the defendant is indebted to the plaintiff, and specifying, as near as may be, the amount of such indebtedness, over and above all legal set-offs, and that the same is due upon contract, express or implied, or upon judgment. Under that statute a plaintiff in attachment filed a declaration, counting upon the breach of an express contract for freight of certain vessels, claiming damages therefor, and for demurrage, and upon the common counts in *indebitatus assumpsit*, for the use of said vessels, retained and kept on dunnage, and a *quantum meruit* count, for use, &c. The court, in considering the question whether the declaration disclosed a cause of action which would sustain an attachment, said: "What is an indebtedness? It is the owing of a sum of money upon contract or agreement, and in the common understanding of mankind, it is not less an indebtedness that the sum is uncertain. The result of a contrary doctrine would be to hold any liability which could

[1] Turner *v.* Collins, 1 Martin, N. S. 369.
[2] Cross *v.* Richardson, 2 Martin, N. S. 323.
[3] Jones *v.* Buzzard, 2 Arkansas, 415.
[4] Bausman *v.* Smith, 2 Indiana, 374.

only be the subject of a general *indebitatus assumpsit*, *quantum meruit*, or *quantum valebat* count in a declaration, such an indebtedness as could not be the subject of this remedy by attachment. Without fully deciding this point, which is not necessarily raised in this case, we see no reason why a demand arising *et contractu*, the amount of which is susceptible of ascertainment by some standard referable to the contract itself, sufficiently certain to enable the plaintiff, by affidavit, to aver it as near as may be, or a jury to find it, may not be a foundation of a proceeding by attachment. In the present case the contract furnishes such standard, equally as does any contract for goods sold, or work or labor done, without express agreement as to price or compensation."[1] In the same State, under the same statute, it was considered that a suit by attachment was maintainable on the *implied assumpsit* arising out of the embezzlement by a clerk of the money of his employer.[2]

§ 23. In the cases above cited, where the damages were unliquidated, it will be observed that the contracts, for breach of which suits were brought, afforded a rule in themselves for ascertaining the damages, and upon this ground the actions were sustained. But where such is not the case, it has been considered that attachment cannot be resorted to; as will appear in the next three sections.

§ 24. In the Circuit Court of the United States for the third circuit, a case arose, in which damages were claimed by the owner of a ship, of one who had chartered the ship, for renouncing the charter-party, and refusing to permit her to proceed on the contemplated voyage. In the opinion of the court, dissolving the attachment, it was said: "Whether the plaintiffs can maintain any action upon this charter-party, by reason of the refusal of the defendant to take on board a cargo, and to prosecute a voyage, is a question which has not been considered by the court; nor is it necessary that it should be decided. For, if an action can be maintained upon it, it still remains to be inquired, By what standard are the damages, which the plaintiffs have sustained on account of the refusal of the defendant to perform the voyage, to be ascertained? That furnished by the contract was a certain sum per month, during the voyage, to be ascertained at its termination; but that event never took place;

[1] Roelofson *v.* Hatch, 3 Michigan, 277.
[2] National Bank *v.* Fonda, 65 Michigan, 533.

and consequently no rule can be deduced from this source to fit the present case. This, then, is a case in which unliquidated damages are demanded; in which the contract alleged as the cause of action affords no rule for ascertaining them; in which the amount is not, and cannot, with propriety, be averred in the affidavit; and which is, and must be, altogether uncertain, until the jury have ascertained it; for which operation no definite rule can be presented to them."[1]

§ 25. In New Jersey, the statute required the plaintiff, in order to obtain an attachment, to make oath that the defendant "owes the plaintiff a certain sum of money, specifying as nearly as he can the amount of the debt or balance." An attachment was obtained in an action of covenant, upon an affidavit that the defendant owed the plaintiff $300, "damages he had sustained by reason of the breach of covenant which the defendant made to the plaintiff and hath broken." The nature of the covenant was not disclosed by the affidavit or otherwise; and the attachment was not sustained, because the cause of action sounded in damages merely, and those damages were unliquidated, and could not possibly be reduced to any degree of certainty without the intervention of a jury. But the court considered that where a covenant is for the payment of a sum certain it might be proceeded on by attachment.[2] In the same State, it was decided that attachment would not lie for the recovery of a penalty intended to secure unliquidated damages;[3] and in Georgia, that it would not in an action for such damages, resulting from a breach of covenant.[4]

§ 26. In Alabama, under that clause of the statute above referred to, which authorized an attachment where the defendant was *indebted* to the plaintiff, the following case arose. The plaintiff alleged that the defendant contracted with him to take certain iron upon a vessel lying at New Orleans and bound for Providence. The iron was in three flatboats, which were taken alongside the vessel, and the defendant commenced taking it on board; but he left a quantity of it in the boats and refused to

[1] Clark *v.* Wilson, 3 Washington C. C. 560. *Sed contra*, Redwood *v.* Consequa, 2 Browne, 62.

[2] Jeffery *v.* Wooley, 5 Halsted, 123; Barber *v.* Robeson, 3 Green, 17.

[3] Cheddick *v.* Marsh, 1 Zabriskie, 463; Hoy *v.* Brown, 1 Harrison, 157; Dickerson *v.* Simms, Coxe, 199. See State *v.* Beall, 3 Harris & McHenry, 347.

[4] Mills *v.* Findlay, 14 Georgia, 230. It was, however, held otherwise, under a subsequent statute, which is noticed in § 27.

take it, alleging that it would not pack well with the remainder of the freight. One of the boats, containing about forty tons of the iron, of the value of $1,000, sunk, and was totally lost. There was ample time for the defendant to have taken the iron on board his vessel, and its loss was caused by his refusal to take it according to his contract. The court, regarding the cause of action as one for general and unliquidated damages, and not within the terms of the law, dissolved the attachment.[1] In Texas, under a statute requiring affidavit that the defendant is "justly indebted" to the plaintiff, it was held, that attachment would not lie on a claim for unliquidated damages for breach of a contract agreeing to employ the plaintiff as a travelling salesman of clothing, at a certain commission on all sales effected by him, and accepted by his employers.[2]

§ 27. The cases cited in the next preceding three sections arose under statutes which contemplated *indebtedness* as the foundation of the action. But in some States the language which would limit the remedy to cases of that kind has been replaced by more comprehensive terms; and we will notice the decisions which have been made under laws of that description.

In New York, under a law authorizing attachment "in an action arising on contract for the recovery of money only," it cannot be resorted to in a proceeding to foreclose a mortgage;[3] nor in an action for breach of marriage promise;[4] nor in an action for the recovery of damages for the loss by negligence of goods which the defendant undertook, as a common carrier, to convey from Boston to China.[5] But a claim for damages upon the breach of a contract by the defendant to purchase sound corn for the plaintiffs, was considered to authorize an attachment; the breach complained of being that the corn was not sound, and the amount claimed being the difference between that paid and that for which the corn was sold.[6]

In Minnesota, under a statute authorizing an attachment in an action "for the recovery of money," it may be resorted to in any action, either *ex contractu* or *ex delicto*.[7]

[1] Hazard *v.* Jordan, 12 Alabama, 180.

[2] Hochstadler *v.* Sam, 73 Texas, 315.

[3] Van Wyck *v.* Bauer, 9 Abbott Pract. N. s. 142.

[4] Barnes *v.* Buck, 1 Lansing, 268. And so in North Carolina, under a statute identical with that of New York. Price *v.* Cox, 83 North Carolina, 261. See Wilson *v.* L. C. Man. Co. 88 Ibid. 5; Winfree *v.* Bagley, 102 Ibid. 515.

[5] Atlantic Mut. Ins. Co. *v.* McLoon, 48 Barbour, 27.

[6] Lawton *v.* Kiel, 51 Barbour, 30; 34 Howard Pract. 465.

[7] Davidson *v.* Owens, 5 Minnesota, 69.

In Ohio, under a statute using the same terms, it was held, that an attachment might be obtained on an obligation to deliver, *on and* after a certain day, iron metal in payment, at a rate agreed *on*, for iron ore sold and delivered; and that it might be obtained before the maturity of the obligation;[1] and that it might be resorted to in an action by one partner against his co-partner, after the dissolution of the firm, to recover a general balance claimed upon an unsettled partnership account.[2] And it was decided there, that an attachment could not lie against the property of a married woman, in an action to charge her separate estate with the payment of notes made by her, because, as no personal judgment could be rendered against her, the action was not "for the recovery of money."[3]

In Georgia, under a statute authorizing suits by attachment "in all cases of money demands, whether arising *ex contractu* or *ex delicto*," an attachment may be resorted to in an action for breach of a promise of marriage;[4] and in one for the seduction of plaintiff's daughter.[5] The same court decided that it could not be maintained on a note, before it became due, which was payable "in notes good and solvent when this becomes due," though the statute authorized an attachment on a "money demand" before its maturity; it being considered that such a note was not a money demand until after it fell due and remained unpaid.[6]

Under the law of California, authorizing the writ in cases upon "contract for the *direct payment* of money," it was held, that an undertaking filed by an appellant, "that he will pay all the damages and costs which may be awarded against the defendant on the appeal, not exceeding $300, and that if the judgment appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant on the appeal," was a contract for the direct payment of money within the meaning of the law.[7] And under the same law the official bond of a county treasurer was considered to be an obligation for the direct payment of money, on which an attachment might be issued.[8] And where a sum of money had been paid upon a consideration which had entirely

[1] Ward *v.* Howard, 12 Ohio State, 158.
[2] Goble *v.* Howard, 12 Ohio State, 165.
[3] Hoover *v.* Gibson, 24 Ohio State, 389.
[4] Morton *v.* Pearman, 28 Georgia, 323.
[5] Graves *v.* Strozier, 37 Georgia, 32.
[6] Monroe *v.* Bishop, 29 Georgia, 159.
[7] Hathaway *v.* Davis, 33 California, 161.
[8] Monterey *v.* McKee, 51 California, 255.

failed, it was held, under the same statute, that the law implied a contract to refund it, authorizing an attachment.[1]

§ 27 *a*. The debt for which an attachment may issue must possess an actual character, and not be merely possible, and dependent on a contingency that may never happen. Therefore, where the plaintiff alleged as a ground of attachment, that he was security upon a draft drawn for the defendant in the sum of $900, and that the defendant was about to remove himself out of the State, so that the ordinary process of law could not be served on him, and that thereby the plaintiff would probably have the draft to pay, or suit would have to be brought for the same in another State, the attachment was not sustained.[2]

§ 27 *b*. In New York, a warrant of attachment is granted "where the action is to recover a sum of money only, as damages for breach of contract, express or implied." Such a warrant was granted in an action on a judgment obtained in Texas. A motion was made to vacate the attachment on the ground that it did not appear for what cause of action the judgment had been rendered, and hence that it might have been rendered in an action *ex delicto*. The motion was sustained by the Supreme Court in General Term; but its judgment was reversed by the Court of Appeals, holding that whatever may have been the previous cause of action, it became merged in the judgment; which, whether it was recovered for a tort or upon a contract, became a debt which the defendant was under obligation to pay, and the law implied a promise or contract on his part to pay it.[3]

§ 28. And though, as in some States, an attachment will lie on a debt not due, yet there must be an actual subsisting debt, which will become due by the efflux of time. Therefore, where suit was brought on the 4th of February, by the drawers against

[1] Peat Fuel Co. *v.* Tuck, 53 California, 304.

[2] Benson *v.* Campbell, 6 Porter, 455; Taylor *v.* Drane, 13 Louisiana, 62; Harrod *v.* Burgess, 5 Robinson (La.), 449. See Coates *v.* White, 15 Philadelphia, 295. In Moore *v.* Holt, 10 Grattan, 284, in a proceeding by attachment *in chancery*, authorized by the laws of Virginia, it was decided, that a guarantor might maintain a bill against the principal debtor, in order to protect himself against loss by reason of the debtor's failure, before he has actually been subjected to liability as guarantor. This doctrine, however, is sustainable only on equitable grounds, under equity jurisdiction, and has not, so far as I have discovered, been recognized as applicable to a proceeding at law.

[3] Gutta Percha & R. M. Co. *v.* Mayor, &c., 108 New York, 276; 20 Abbott's New Cases, 218.

the acceptor of bills of exchange, which had been protested before, but were not taken up by the drawers until some days after that day, though on that day an agreement was made by them to take them up; it was considered that the drawers could maintain no action until the bills were actually taken up, and that the completion of the agreement could not relate back to the time it was made, and reinvest them with the title to the bills on the 4th of February.[1] And so, where a creditor, for the accommodation of his debtor, accepted a bill drawn by the debtor, payable a certain number of days after date, for the amount of the debt, with interest to maturity, and the bill was discounted by a bank, and the proceeds applied to the extinguishment of the original debt; it was decided that the acceptor was not a creditor of the drawer until the maturity of the bill and his payment of it; and that his payment of it at maturity could not retroact so as to give validity to an attachment sued out by him before the payment.[2] And so where an attachment was obtained on the 9th of November, to recover damages for the non-fulfilment of a contract to deliver a certain amount of cotton "during the succeeding fall," it was set aside, because the defendant was not then in default, and no claim for damages had accrued.[3]

§ 29. In New York, A. agreed with B., that if B. would sell him goods on credit, and also guarantee his liability to C. for a certain sum, he would ship and consign to B. all the fish he should become possessed of in his business in Nova Scotia, as security for the goods and the guaranty. B. sold him the goods on credit, and became guarantor to C.; and afterwards A. sent fish from Nova Scotia, but refused to consign them to B.; whereupon, and before the term of credit had expired, B. obtained an attachment against A. It was objected that no cause of action existed until the expiration of the credit on the sale of the goods, and that therefore the attachment should be discharged; but the court held, that the contract to give security was broken, and an action might then be sustained for the breach of it, without any reference to the time of the credit, except that if a judgment were obtained before the credit expired, the court had sufficient equity powers over its own judgments

[1] Blanchard v. Grousset, 1 Louisiana Annual, 96.

[2] Read v. Ware, 2 Louisiana Annual, 498. See Price v. Merritt, 13 Ibid. 526; Todd v. Shouse, 14 Ibid. 426; First Nat. B'k v. Moss, 41 Ibid. 227; Hearne v. Keath, 63 Missouri, 84.

[3] Moore v. Dickerson, 44 Alabama, 485.

to postpone the collection of the judgment until the credit should expire, or to vacate it if the security agreed on should be given.[1]

§ 30. In a case which went up to the Supreme Court of the United States from Louisiana, these facts appeared: B., of Charleston, South Carolina, being indebted to Z. & Co., of New Orleans, for the proceeds of a cargo of sugar consigned to him, Z. & Co. drew on him certain bills of exchange, which were accepted for the full amount of those proceeds, and were all negotiated to third persons, were outstanding, and three of them not yet due, when B. made an assignment for the benefit of his creditors. Z. & Co., upon hearing of it, brought suit against B. for the full amount of the proceeds of the cargo of sugar, and attached his property. The question was, whether under the law of Louisiana allowing an attachment to be sued out upon a debt not yet due, this attachment could be maintained. The court said: "It is plain to us that there was no debt due Z. & Co. at the time when the attachment was made. The supposed debt was for the proceeds of a cargo of sugar and molasses, sold by B. on account of Z. & Co. Assuming those proceeds to be due and payable, Z. & Co. had drawn certain bills of exchange upon B., which had been accepted by the latter, for the full amount of those proceeds; and all of these bills had been negotiated to third persons, and were then outstanding, and three of them were not yet due. It is clear, upon principles of law, that this was a suspension of all right of action in Z. & Co., until after those bills had become due and dishonored, and were taken up by Z. & Co. It amounted to a new credit to B. for the amount of those acceptances, during the running of the bills, and gave B. a complete lien upon those proceeds, for his indemnity against those acceptances, until they were no longer outstanding after they had been dishonored.

"It is true the statute law of Louisiana allows, in certain cases, an attachment to be maintained upon debts not yet due. But it is only under very special circumstances; and the present case does not fall within any predicament prescribed by that law. The statute does not apply to debts resting in mere contingency, whether they will ever become due to the attaching creditor or not."[2]

[1] Ward v. Begg, 18 Barbour, 139.

[2] Black v. Zacharie, 3 Howard, Sup. Ct. 483. See Denegre v. Milne, 10 Louisiana Annual, 324; Henderson v. Thornton, 37 Mississippi, 448.

§ 31. In Ohio, under a provision allowing an attachment in certain cases before the debt has become due, it was decided that the holder might proceed in that way against the indorser of a negotiable note; the court regarding the latter as a debtor within the meaning of the statute.[1]

§ 32. In Massachusetts, a question arose as to the time when a demand was due, so as to be sued upon. A. accepted bills for the accommodation of B., and paid them on the second day of grace, and on the morning of the third day of grace sued out an attachment against B., to recover the money so paid for his accommodation. The defendant contended that the plaintiff could not bring his suit until the expiration of the last day of grace; but the court, while recognizing the doctrine that an action could not have been maintained *on the bills* until after that day, yet held that the "payment before the day was good payment at the day," and that the right of action existed at any time on the last day of grace.[2]

§ 33. Where an attachment is authorized for a debt not due, if the grounds of attachment be peculiar to that case, they cannot be resorted to for the recovery of a debt already due. If with the debt not due there be combined a claim that is due, the attachment will be good as to the former, but not as to the latter.[3] In any such case insufficient allegations as to one class of debts do not vitiate the proceedings as to the other class. They will be treated as surplusage.[4] If an action be brought as upon a debt past due, and it be so averred in the affidavit for an attachment, and the debt be not in fact due, the attachment should be quashed.[5] And if the writ be quashed the whole action falls; for the sole purpose of authorizing suit on a demand not due is to allow an attachment to issue for it.[6]

§ 33 *a*. In a suit on a debt not due, it is erroneous to enter judgment for the plaintiff before the maturity of the demand.[7]

§ 34. Attempts have been made by one partner to sue his copartner by attachment, for alleged balances due on account of

[1] Smead *v.* Chrisfield, 1 Handy, 442.
[2] Whitwell *v.* Brigham, 19 Pick. 117.
[3] Levy *v.* Millman, 7 Georgia, 167; Danforth *v.* Carter, 1 Iowa, 546.
[4] Tanner & D. E. Co. *v.* Hall, 22 Florida, 391.
[5] Cox *v.* Reinhardt, 41 Texas, 591.
[6] Gowan *v.* Hanson, 55 Wisconsin, 341.
[7] Ware *v.* Todd, 1 Alabama, 199; Jones *v.* Holland, 47 Ibid. 732; Rice *v.* Jerenson, 54 Wisconsin, 248.

the partnership transactions; and in reference to such cases the following decisions have been had.

In Illinois, under a statute authorizing an attachment where "any creditor shall file an affidavit, setting forth that any person is indebted to him, stating the nature and amount of such indebtedness as near as may be," it was held, that an action of account might be instituted by attachment, by one partner in a commercial adventure against another. The court remarked: "The law was designed to furnish a creditor with the means of collecting his debt, in a case where he would be unable to do so in the ordinary mode of proceeding, and we can see no reason why it should not be as applicable to actions of account as to any other class of cases. The claim of a joint-tenant, tenant in common, or coparcener, is just as sacred as that of any other creditor; and because he cannot resort to the more usual common-law actions to enforce his rights, affords no reason why he should be deprived of the benefit of the attachment act, when he presents a case that would authorize an attachment were he permitted to sue in debt or assumpsit.

"As to the sufficiency of the affidavit there can be no question. After setting forth the dealings between the parties, and the nature of the indebtedness, with great particularity, it alleges that the defendant, by means of the premises, is indebted to the plaintiff in a sum stated, and that the defendant is not a resident of the State. Upon such an affidavit an attachment may properly issue." [1]

In Georgia, a contract was entered into between a freedman and a landlord, to make a crop for one year; the landlord to furnish the land and the stock, and the freedman to work the same, and receive for his labor one-half of the crop made; and the crop was made and gathered; and the landlord refused to deliver to the freedman his proportion of the crop; it was decided that this was not a case of partnership; that the freedman could make out an account against the landlord for his share of the crop, and enforce the collection of the same by attachment. [2]

In Louisiana, an action by attachment, by one general partner against another, for an amount alleged to be due, growing out

[1] Humphreys v. Matthews, 11 Illinois, 471. See Brinegar v. Griffin, 2 Louisiana Annual, 154.

[2] Holloway v. Brinkley, 42 Georgia, 226.

of the transactions of the partnership, cannot be maintained.[1] And so in South Carolina,[2] and California.[3]

In Kansas, to authorize one partner to sue another by attachment, there must first have been an accounting and ascertainment of a balance which the defendant had, expressly or impliedly, promised to pay.[4]

In New York, an action was instituted by one against his former partner, and the complaint alleged the former partnership, a dissolution thereof, an assignment of the plaintiff's interest to the defendant, and the defendant's agreement to pay the partnership liabilities, &c., and divide the surplus; that the surplus was large; that the defendant had applied the assets to his own private use, and refused to render any account to plaintiff; that a large sum of money was due to plaintiff, *but he could not state the amount;* and he demanded an account, and that the defendant pay what, upon the accounting, might be found due. Long after the action was instituted, the plaintiff obtained an attachment, upon an affidavit alleging that more than $25,000 was due him from the defendant. A supplementary affidavit stated the amount at $22,000. A motion to discharge the attachment was sustained, because the plaintiff, in stating the grounds of his claim, disclosed that he did not know, and could not know until an account had been taken, what, or in fact whether anything, was due him; and that his mere opinion or belief was not sufficient to warrant the granting of the process.[5]

§ 35. The right of a creditor to sue his debtor by attachment is not impaired by his holding collateral security for the debt. The Supreme Court of Massachusetts once held, that a creditor who had received personal property in pledge for the payment of a debt could not attach other property for that debt, without first returning the pledge;[6] but this position was afterwards

[1] Levy *v.* Levy, 11 Louisiana, 581; Brinegar *v.* Griffin, 2 Louisiana Annual, 154; Johnson *v.* Short, Ibid. 277.

[2] Rice *v.* Beers, 1 Rice's Digest of South Carolina Reports, 75. This case cannot probably be found in any of the volumes of the South Carolina Reports, but it is no doubt authentic. Mr. Rice's Digest contains many cases decided in South Carolina, and nowhere else reported. In that State they are often referred to in the opinions of the Court of Appeals as authoritative. Whoever would understand the reason of the absence of those cases from the Reports, is referred to the Preface to Nott & McCord's Reports.

[3] Wheeler *v.* Farmer, 38 California, 203.

[4] Treadway *v.* Ryan, 3 Kansas, 437.

[5] Ackroyd *v.* Ackroyd, 11 Abbott Pract. 345; 20 Howard Pract. 93; Guilhon *v.* Lindo, 9 Bosworth, 601; Ketchum *v.* Ketchum, 1 Abbott Pract. N. S. 157.

[6] Cleverly *v.* Brackett, 8 Mass. 150.

repeatedly overruled by that court.[1] And a mortgagee of personal property may waive his rights under the mortgage, and attach the mortgaged property to satisfy the mortgage debt,[2] even after he has taken possession of it under the mortgage.[3]

§ 35 *a*. In Illinois, a creditor having a judgment against his debtor, upon which he has the right to issue execution, may sue by attachment upon that judgment in the same court in which it was rendered.[4]

§ 36. If the cause of action for which the attachment is obtained be one upon which that process might not be legally issued, the defect cannot be reached by demurrer to the declaration.[5] Indeed, as held in Alabama, the defendant, by demurring, makes it impossible for the court to look at the attachment.[6] In that State it is ruled that neither a plea in abatement, motion to quash, nor motion to strike out will reach the defect;[7] but that the proper course is by a rule on the plaintiff to show cause why the writ of attachment should not be dissolved;[8] on the hearing of which rule the court will receive evidence in support or for the discharge of the rule, showing the real nature and character of the demand sought to be enforced by the process.[9] And no advantage can be taken of the defect after verdict, where the defendant appears and pleads to the merits.[10] Nor can a variance between the affidavit and attachment and the complaint be taken advantage of by demurrer;[11] but may by plea in abatement,[12] or by motion to quash.[13]

§ 36 *a*. Where an attachment is obtained on a cause of action not authorizing it, and the defendant is not served with process,

[1] Cornwall *v.* Gould, 4 Pick. 444; Beckwith *v.* Sibley, 11 Ibid. 482; Whitwell *v.* Brigham, 19 Ibid. 117; Taylor *v.* Cheever, 6 Gray, 146. See Porter *v.* Brooks, 35 California, 199; Homer *v.* Falconer, 60 New Hamp. 203; Germania Savings B'k *v.* Penser, 40 Louisiana Annual, 796; Chapman *v.* Clough, 6 Vermont, 123.

[2] Buck *v.* Ingersoll, 11 Metcalf, 226; Whitney *v.* Farrar, 51 Maine, 418.

[3] Libby *v.* Cushman, 29 Maine, 429.

[4] Young *v.* Cooper, 59 Illinois, 121.

[5] Cain *v.* Mather, 3 Porter, 224; Jordan *v.* Hazard, 10 Alabama, 221; Van Dyke *v.* The State, 24 Ibid. 81.

[6] Roberts *v.* Burke, 6 Alabama, 348.

[7] Adair *v.* Stone, 81 Alabama, 113.

[8] Jordan *v.* Hazard, 10 Alabama, 221; Brown *v.* Coats, 56 Ibid. 439; Rich *v.* Thornton, 69 Ibid. 473; Drakford *v.* Turk, 75 Ibid. 339; Adair *v.* Stone, 81 Ibid. 113.

[9] Rich *v.* Thornton, 69 Alabama, 473.

[10] Redus *v.* Wofford, 4 Smedes & Marshall, 579; Marshall *v.* White, 8 Porter, 551; Brown *v.* Coats, 56 Alabama, 439.

[11] Odom *v.* Shackleford, 44 Alabama, 331.

[12] Wright *v.* Snedecor, 46 Alabama, 92.

[13] Foske *v.* Hardeman, 67 Texas, 173.

the proceeding is a nullity, and the court has no jurisdiction of the action, and no subsequent amendment of the pleadings can give the proceedings any vitality under *that* writ. Such amendment merely makes a case authorizing proceedings to acquire jurisdiction, and a new attachment must issue upon the new cause of action set up by the amendment.[1] Where two or more causes of action are joined in the suit, and an attachment is issued for the aggregate of them; and it afterward appears that for a part of them there was, and for a part of them there was not, a sufficient ground for issuing the writ, the attachment should be dissolved as to the whole.[2]

§ 37. There can be no doubt that a corporation as well as a natural person may sue by attachment, though the statute may require the affidavit to be made by the plaintiff, without mentioning any other person by whom it may be made. The law which gives existence to the corporation, and which allows it to sue and be sued, necessarily confers on it the authority to act through its agents in any such matter.[3]

[1] Pope *v.* Hibernia Ins. Co., 24 Ohio State, 481. See Union C. M. Co. *v.* Raht, 16 New York Supreme Ct., 208; Watt *v.* Carnes, 4 Heiskell, 532; Mudge *v.* Steinhart, 78 California, 34.

[2] Estlow *v.* Hanna, 75 Michigan, 219; Mayer *v.* Zingre, 18 Nebraska, 458; Meyer *v.* Evans, 27 Ibid. 367. See McGovern *v.* Payn, 32 Barbour, 33. *Sed Contra*, Dawson *v.* Brown, 12 Gill & Johnson, 53; Boarman *v.* Patterson, 1 Gill, 372; Gross *v.* Goldsmith, 4 Mackey, 126.

[3] Trenton Banking Co. *v.* Haverstick, 6 Halsted, 171.

CHAPTER III.

ABSENT, ABSCONDING, CONCEALED, AND NON-RESIDENT DEBTORS; DEBTORS REMOVING OR FRAUDULENTLY DISPOSING OF THEIR PROPERTY; AND DEBTORS WHO FRAUDULENTLY CONTRACTED THE DEBT OR INCURRED THE OBLIGATION SUED ON.

§ 38. ATTACHMENTS are generally authorized against absent, absconding, concealed, and non-resident debtors; and we will now consider the adjudications in relation to these several classes of persons.

§ 39. *Absent Debtors.* It has never been considered, so far as I have discovered, that mere temporary absence from one's place of residence, accompanied with an intention to return, is a sufficient cause for attachment. Were it so regarded, no limit could be set to the oppressive use of this process. Hence we find that usually the absence must either be so protracted as to amount to a prevention of legal remedy for the collection of debts, or be attended by circumstances indicative of a fraudulent purpose. It is often, therefore, expressly provided, that to authorize an attachment on account of absence, the absence must be of such character that the ordinary process of law cannot be served on the debtor. But even where no such qualification exists, no case is to be found justifying an attachment upon a casual and temporary absence of a debtor;[1] even though he may not have a house of usual abode in the place of his residence, at which a summons against him might be served during his absence.[2]

§ 40. In Louisiana, an attachment was taken out against a merchant, who, during the summer, left his store in New Orleans in charge of agents, and went to New York on business, avowing his intention to return in the fall. It was contended that any kind of absence of the debtor from the jurisdictional limits of the State authorized the attachment; but this view was rejected by the court.[3]

[1] Fuller *v.* Bryan, 20 Penn. State, 144; Mandel *v.* Peet, 18 Arkansas, 236.

[2] Keller *v.* Carr, 40 Minnesota, 428.

[3] Watson *v.* Pierpont, 7 Martin, 413.

§ 41. In New York, the court seemed to lay stress upon the fact that the debtor was out of the reach of the process of law; and held, that the remedy by attachment was available against an absent debtor, whether absent permanently or temporarily; and negatived the idea that one might go openly to another State or country, and remain there doing business, but intending to return when his convenience will permit, and by such expressed intention prevent the resort to this remedy.[1]

§ 42. It is by no means easy to determine what absence of a resident will justify an attachment. The Supreme Court of Missouri felt the difficulty, in construing a statute which authorized an attachment where the debtor "has absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him." "While," said the court, "it is not admitted that every casual and temporary absence of the debtor from his place of abode, which, during the brief period of his absence, may prevent the service of a summons, is a legal ground for issuing an attachment against his property, it is difficult to define the character and prescribe the duration of the absence which shall justify the use of this process. It may be asserted, however, that where the absence is such that if a summons issued upon the day the attachment is sued out, will be served upon the defendant in sufficient time before the return day to give the plaintiff all the rights which he can have at the return term, the defendant has not so absented himself as that the ordinary process of law cannot be served upon him."[2]

§ 43. In New York, under a statute authorizing an attachment where the defendant "has departed from the State with intent to avoid the service of a summons," a somewhat similar question arose, as to the act of departure which would sustain an attachment. Unlike the case in Missouri just referred to, the matter of duration of absence was not involved, but the intent of the departure. The defendant openly and publicly went to England on business, making known to his family and his employees his intention to go, and expressing his expectation to return in six weeks. But he was on the eve of bankruptcy; and the court held, that if he left the State, though openly and publicly, and intending to transact business abroad and then return, but with a view of having the explosion of his affairs take place in his

[1] Matter of Thompson, 1 Wendell, 43. 657; Ellington v. Moore, 17 Ibid. 424.
[2] Kingsland v. Worsham, 15 Missouri, See Fitch v. Waite, 5 Conn. 117.

absence, and of avoiding the importunity and the proceedings of his creditors, the attachment could be sustained.[1]

§ 44. In Pennsylvania, an attachment might issue "where the defendant had absconded, or departed from his abode, or remained out of the State, with design to defraud his creditors." A creditor obtained an attachment, on the allegation that his debtor had departed with that design. The defendant returned before the first day of the term of court, and resisted the attachment, urging his declaration, before he left, that the object of his journey was to collect debts due to him in Baltimore and elsewhere, his leaving his family behind, and his subsequent return, as disproving the alleged intent. But, on the other hand, it was shown, that before his departure he had refused to be seen by his creditors; had left the city clandestinely, after night, to join the Baltimore stage the next morning; had borrowed three dollars on the road; and had ordered letters to be sent to him, directed to another name. On these facts the court considered that the departure with a design to defraud his creditors was not disproved, and the attachment was sustained.[2]

§ 45. A similar case occurred in Louisiana. An attachment was obtained on the ground that the defendant "had departed from the State, never to return." Afterwards he did return; and the question was, whether his return was conclusive evidence of his intention, when he departed, to return. The defendant showed that he had been a resident of the State for about five years, and carried on business as a merchant; and that during that time he had been in the habit of absenting himself every year during the sickly season, leaving an agent or clerk to attend to his business. On the other hand, it appeared that the defendant was charged with having, with the aid of one of the tellers of a bank, — the plaintiff, — actually defrauded it of a sum of upwards of sixty thousand dollars. The court admitted that, in the absence of any suspicious circumstances, the defendant's return would probably be sufficient to establish the existence, when he left, of an intention to return; but that the consequences he had to apprehend from the fraud he was charged with having committed, rendered his intention to avoid them by flight so probable, that the mere circumstance of his return did not totally destroy the presumption.[3]

[1] Morgan v. Avery, 7 Barbour, 656.

[2] Gibson v. McLaughlin, 1 Browne, 292.

[3] New Orleans Canal and Banking Co. v. Comly, 1 Robinson (La.), 231. See

§ 46. The term "absent defendants" received a judicial construction in Kentucky, where it was held to include only such as were, at the commencement of the suit, actually absent from the State.[1] And in South Carolina, under a statute authorizing an attachment against a debtor, "being without the limits of the State," an attachment was quashed, because, when issued, the defendant was in fact within the State, though he concealed himself to avoid process, and though, by his conduct and conversation before his disappearance, he had given good reason to believe that he had left the State.[2]

§ 47. A case arose in New York, which, though not very fully and definitely reported as to the particular rule deducible from it, may nevertheless be considered as laying down this doctrine, — that where a particular act, done by a debtor, will authorize an attachment, if coupled with either one of two several intents, and an attachment is obtained on an averment of the doing of the act with one of those intents, it will be sustained by proof of the other intent. The case involved a construction of that clause in the Code of Procedure authorizing an attachment where the defendant "has departed from the State with intent to defraud his creditors, or to avoid the service of a summons." Here, it will be noticed, is one act, coupled, disjunctively, with two several intents. The act alone would not authorize an attachment, but, done with either intent, would. An attachment was obtained on an affidavit alleging a departure, with intent to

Reeves *v.* Comly, 3 Ibid. 363; Simons *v.* Jacobs, 15 Louisiana Annual, 425.

[1] Clark *v.* Arnold, 9 Dana, 305. In Kentucky, an attachment is authorized where the debtor "has been absent from the State four months." Under this provision this case arose. A. left his house in Washington county, some sixty miles from Louisville, on the 18th of December, 1859, with stock for Mississippi and Louisiana. He expected to ship the stock on a steamer at Louisville on the 20th December, but was unexpectedly and unavoidably detained at Louisville until the 24th, when he embarked, with his stock, on a steamer bound down the Ohio River. He did not return to Kentucky until about the first of the following May. On and after the 21st of April, several attachments were sued out against him. The question was, whether the four months' absence from the State had elapsed on the 21st of April, which was more than that period after he left his house, but less than that after he embarked at Louisville. The court considered the matter at length, and announced its conclusion in these words: "Where the debtor leaves his home with the intention of going out of the State, and does consummate his purpose, and is absent from his home, pursuant to such intention, for the period of four months, we think this should be regarded as an absence from the State, within the meaning of the code and the intention of the Legislature, notwithstanding some unlooked-for casualty may have delayed him a few days from passing beyond the territorial boundary of the State." Spalding *v.* Simms, 4 Metcalfe (Ky.), 285.

[2] Wheeler *v.* Degnan, 2 Nott & McCord, 323.

defraud creditors. The defendant moved to set aside the attachment, and adduced evidence to disprove the alleged intent. The plaintiff gave evidence to sustain the allegation of the affidavit. The court held it not necessary to prove the intent as averred, provided the evidence proved the other intent to have existed; and the attachment was sustained, because the other intent was considered proved. It can hardly be questioned that this is a just and sound view. The designated intents, though severally stated, are very similar in character, and it might be impracticable to aver with certainty, or to prove, which intent was present in the mind of the defendant at the time of departure.[1]

§ 48. *Absconding Debtors.* An absconding debtor is one who, with intent to defeat or delay the demands of his creditors, conceals himself, or withdraws himself from his usual place of residence beyond the reach of their process;[2] and in order to constitute an absconding, it is not necessary that the party should depart from the limits of the State in which he has resided.[3] The Supreme Court of Connecticut remarked: "If a person depart from his usual residence, or remain absent therefrom, or conceal himself in his house, so that he cannot be served with process, with intent unlawfully to delay or defraud his creditors, he is an absconding debtor. But if he depart from the State, or from his usual abode, with the intention of again returning, and without any fraudulent design, he has not absconded, within the intendment of the law." Therefore, where a debtor departed from L., his usual place of residence, and went to M., in the same State, where he worked openly at his trade for above three months, without taking any measures to conceal himself, it was held, that he was not, with respect to a creditor in L., an absconding debtor, although his friends and neighbors in L. did not know where he was, and his absence was a subject of conversation among them.[4]

§ 49. Since concealment, or withdrawal from one's place of abode, with the intent before mentioned, is a necessary element of absconding, it cannot be said of one who resides abroad, and comes thence into a particular jurisdiction, and returns from

[1] Morgan v. Avery, 7 Barbour, 656.

[2] In Bennett v. Avant, 2 Sneed, 152, the Supreme Court of Tennessee said: "To abscond, in a legal sense, means to hide, conceal, or absent one's self clandestinely, with the intent to avoid legal process."

[3] Field v. Adreon, 7 Maryland, 209; Stouffer v. Niple, 40 Ibid. 477.

[4] Fitch v. Waite, 5 Conn. 117. See Oliver v. Wilson, 29 Georgia, 642.

that jurisdiction to his domicile, that, in leaving the place which he had so visited, he was an absconding debtor.[1] And under a statute authorizing an attachment against *any* person absconding or concealing himself, so that the ordinary process of law could not be served upon him, it was held, that only residents of the State who absconded were within the scope of the law, and that an attachment would not lie, for that cause, against one who had not yet acquired a residence there.[2]

In Alabama, however, upon affidavit that the defendant "absconds or secretes himself so that the ordinary process of law cannot be served upon him," an attachment was sustained, though the defendant was a resident of another State, and was only casually in Alabama.[3]

§ 50. An attachment was taken out on affidavit that the defendant had departed the State with the intent of avoiding arrest and defrauding his creditors. Upon its being made to appear to the court that he left his home to go to another place in the same State to sell some property; that, previous to his departure, the object of his journey was communicated to his neighbors, and was generally understood; and that he publicly took his departure and returned within ten days, the attachment was superseded.[4] And so, where it appeared that the defendants had not absconded, although from the facts and circumstances the creditor was authorized to say that he *believed* they had done so.[5]

§ 51. The act of absconding necessarily involves *intention* to abscond. Therefore a public and open removal, or a departure unaccompanied with that intention, will not constitute an absconding. Much less will such a departure, accompanied with the expressed purpose to return, when there are no suspicious circumstances to the contrary.[6]

§ 52. In showing the true character of a departure, where it is alleged that it was but for a season, with the intention of returning, evidence of common reputation in the neighborhood to that effect is inadmissible.[7] But in all such cases, what the party said contemporaneously with his departure, or immedi-

[1] Matter of Fitzgerald, 2 Caines, 318; Matter of Schroeder, 6 Cowen, 603.
[2] Shugart v. Orr, 5 Yerger, 192.
[3] Middlebrook v. Ames, 5 Stewart & Porter, 158.
[4] Matter of Chipman, 1 Wendell, 66.
[5] Matter of Warner, 3 Wendell, 424.
[6] Boardman v. Bickford, 2 Aikens, 345.
[7] Pitts v. Burroughs, 6 Alabama, 733; Havis v. Taylor, 13 Ibid. 324.

ately previous thereto, as to the point of his destination, the object he had in view, and when he expected to return, is a part of the *res gestæ*, and may be received in evidence as explanatory of his intentions, and, in the absence of opposing proof, might repel the imputation that he was absconding, or otherwise endeavoring to evade the service of ordinary process.[1] And so his acts and declarations at the time of, or immediately anterior to, the departure, are good evidence to show the intention to abscond.[2]

§ 53. As the act of absconding is a personal act, it can be alleged only of him who has done it. "A person can neither abscond, keep concealed, nor be absent by proxy." Therefore, where one member of a firm absconded, and a creditor of the firm sued all the partners in attachment as absconding debtors, and one of the defendants pleaded in abatement that he had not absconded, the plea was held sufficient to defeat the action.[3] But where the affidavit was, that "A. & Co., said firm composed of A. and certain parties unknown to deponent, absconds," it was held, in Georgia, that the attachment could not be dismissed on motion.[4]

§ 53 *a*. The fact that a defendant, against whom an attachment has been obtained on the ground of his having absconded, afterwards appears to the action, does not constitute proof that the affidavit alleging the absconding was false. He may have been an absconding debtor when the writ was issued, and have returned afterwards.[5]

§ 54. *Debtors concealing themselves.* The concealment which will justify an attachment is but a phase of absconding, though sometimes in attachment laws the two acts are set forth separately, so as to indicate that they are regarded as distinct. More usually, however, they are connected together thus, — "absconds or conceals," or "absconds or secretes;" in which case they have been regarded, and no doubt rightly, as undistinguishable. Therefore, an affidavit stating that the defendant "absconds or conceals himself," does not exhibit two separate grounds for

[1] Pitts *v.* Burroughs, 6 Alabama, 733; Offutt *v.* Edwards, 9 Robinson (La.), 90; Havis *v.* Taylor, 13 Alabama, 324; Burgess *v.* Clark, 3 Indiana, 250; Oliver *v.* Wilson, 29 Georgia, 642; Brady *v.* Parker, 67 Ibid. 636; Wallace *v.* Lodge, 5 Bradwell, 507.

[2] Ross *v.* Clark, 32 Missouri, 296.

[3] Leach *v.* Cook, 10 Vermont, 239.

[4] Hines *v.* Kimball, 47 Georgia, 587.

[5] Phillips *v.* Orr, 11 Iowa, 283.

attachment, which, coupled by the disjunctive "or," would be vicious, but one only, for the terms are of equivalent meaning.[1]

§ 54 *a*. An attachment was obtained on an affidavit that the defendant "so conceals himself that process cannot be served upon him." The facts were, that the defendant was called upon in the evening for payment of the demand, and notified that unless he made it suit would be instituted. During the night, or the next morning, he sold out his entire stock of goods, without taking an invoice, and in the morning left, and was absent for two months. When called upon, the evening before, he had promised to call and see plaintiff's attorney in the morning, but left without doing so, or giving any notice that he designed to leave. Upon these facts an instruction to the jury in the following terms was held correct: "It is concealment to avoid service of process, no matter whether for an hour, a day, or a week; whether with a view to defraud creditors or merely to have time to make a disposition, lawful or otherwise, of his property, before his creditors got at him; it is placing himself designedly so that his creditors cannot reach him with process; which constitutes concealment under the statute."[2] And if a man leave a place, requesting false information to be given of his movements, he conceals himself.[3]

§ 55. Where an attachment was issued, on affidavit that "the defendant was secreting himself, so that the ordinary process of law could not be served;" and it was shown on his behalf, that he was temporarily absent from his place of abode, on a visit to his son-in-law in another county of the same State; that the plaintiff knew the defendant's intention to make said visit long before he started, and that his intention was also publicly and notoriously known; it was held to be unnecessary for the defendant to show that *he* communicated to the plaintiff his intention to make the visit, and that it was sufficient if it were known in the neighborhood, and could have been ascertained on inquiry.[4]

§ 56. Under a statute authorizing an attachment to issue against a debtor on the ground that "he conceals himself *in order* to avoid being cited," it was held in Louisiana, that an absconding to avoid a criminal prosecution, and not to prevent

[1] Goss *v.* Gowing, 5 Richardson, 477; Conrad *v.* McGee, 9 Yerger, 428.
[2] Young *v.* Nelson, 25 Illinois, 565.
[3] North *v.* McDonald, 1 Bissell, 57.
[4] Walcott *v.* Hendrick, 6 Texas, 406. See Boggs *v.* Bindskoff, 23 Illinois, 66.

civil suits being brought against the absconder, did not authorize an attachment.[1] But in Alabama, under a statute giving an attachment against one who "secretes himself *so that* the ordinary process of law cannot be served on him," it was ruled that it would lie against one who fled to avoid arrest for a criminal offence.[2] And in Kentucky, under a statute authorizing an attachment against a party who "has left the county of his residence to avoid the service of a summons," it was held, that a flight by one for the purpose of avoiding arrest to answer a criminal charge, had the *effect* to prevent the service of a summons to answer in a civil action for the same wrong, and therefore, though not within the letter, it came within the reason of the statute.[3]

§ 56 *a*. This concealment must be *averred* to be the act of the defendant. Under a statute authorizing an attachment "when the debtor *conceals himself* so that process cannot be served upon him," an affidavit that the defendant "*is concealed* within this State, so that process cannot be served upon him" was held bad, because it did not allege that the defendant *concealed himself*. Said the court: "To authorize the attachment, it must appear that there was an intent upon the part of the debtor to conceal himself, so that process cannot be served on him. It must be his own misconduct or bad faith, and not the acts or misconduct of any other person; and that fact must positively appear by averments."[4]

§ 56 *b*. Where an attachment is regularly issued, on the ground that "the defendant evades the service of ordinary process by concealing himself," the fact that on the same day that the attachment was levied, but *after* its levy, he was personally served with process, is no ground for the court's refusing judgment of condemnation of the property attached. "It very often happens that the man who cannot be found just before the service of an attachment is very oppressive in his presence just afterwards."[5]

§ 57. *Non-resident debtors.* In Georgia, on a motion to dismiss an attachment obtained on the ground that the defendant

[1] Evans *v.* Saul, 8 Martin, N. S. 247.
[2] Malone *v.* Handley, 81 Alabama, 117.
[3] Bank of Commerce *v.* Payne, 86 Kentucky, 446.
[4] Winkler *v.* Barthel, 6 Bradwell, 111.
[5] Giddings *v.* Squier, 4 Mackey, 49.

resided out of the State, it was urged in support of the motion that the attachment was void under the 14th amendment of the Constitution of the United States; but the court said: "No one ever dreamed that the attachment laws of the several States authorizing attachments against non-resident defendants, were violative of the Constitution of the United States. Argument is unnecessary." [1]

§ 57 *a*. Mere absence from a particular jurisdiction is not a convertible term with non-residence.[2] As we shall presently see, absence from one's domicile may be so prolonged as to justify his being subjected to attachment as a non-resident; but where a statute authorizes an attachment on the ground of a debtor's non-residence, he cannot be proceeded against on an affidavit alleging that he absconds and is not within the State.[3]

§ 58. In determining whether a debtor is a resident of a particular State, the question as to his domicile is not necessarily always involved; for he may have a residence which is not in law his domicile. Domicile includes residence, with an intention to remain; while no length of residence, without the intention of remaining, constitutes domicile.[4]

§ 59. A *resident* and an *inhabitant* mean the same thing. A person resident is defined to be one "dwelling or having his abode in any place;" an inhabitant, "one that resides in a place." [5] These terms will therefore be used synonymously, as they may occur in the cases cited.

§ 59 *a*. In the attachment law of at least one State, — Maryland, — the word *citizen* is used in reference to persons liable to be proceeded against by attachment; and the meaning of that word, in that connection, became the subject of discussion there; and the court held, that a party may not be a citizen for political purposes, and yet be one for commercial or business purposes, and considered that one who was residing and doing business in that State was, in contemplation of the attachment laws, a citizen of that State, though an unnaturalized foreigner, and enti-

[1] Pyrolusite M. Co. *v.* Ward, 73 Georgia, 491.

[2] Chariton County *v.* Moberly, 59 Missouri, 238.

[3] Croxall *v.* Hutchings, 7 Halsted, 84.

[4] Matter of Thompson, 1 Wendell, 43; Foster *v.* Hall, 4 Humphreys, 346; Mitchell *v.* United States, 21 Wallace, 350.

[5] Roosevelt *v.* Kellogg, 20 Johns. 208; Matter of Wrigley, 4 Wendell, 602; 8 Ibid. 134; 2 Kent's Com. 431, note; Wiltse *v.* Stearns, 13 Iowa, 282.

tled to no political privileges. This was, in effect, to make no distinction in meaning between the words *citizen*, *resident*, and *inhabitant*.[1]

§ 60. Where a subject of a foreign government, who had been trading in the West Indies, came to this country on a commercial adventure without any idea of settling here, or of not returning hence as soon as his business was settled, he was held to be a non-resident, and liable as such to an attachment.[2] So, a person coming occasionally to a place in the course of trade, is not an inhabitant of that place.[3] Nor can one who removed from another State clandestinely, and conceals himself in that to which he fled, be regarded as a resident of the latter.[4] So, where one who had been a resident of New York, broke up his residence and sailed for England *sine animo revertendi*, but, after staying there three weeks, returned to New York, on his way to Canada, and took lodgings in Brooklyn to await the arrival of his goods, and remained there a few weeks, and then passed over to New York, and took lodgings there for a few days; it was held, that these circumstances afforded no foundation for a pretence that he was a resident or inhabitant of New York.[5]

§ 61. But one who goes to a place with the intention to reside there becomes a resident of that place, and acquires a domicile there, whether the residence have been long or short.[6] But this *animus manendi* must certainly exist, otherwise no domicile is acquired. Therefore, where one abandoned his residence in Indiana, and went thence with his family to New York, where he lived with a friend, while he was looking out for an opportunity of again getting into business; and whether he should finally settle in that State or elsewhere, was undetermined; it was considered that he might be proceeded against by attachment as a non-resident of New York.[7] But where an attachment

[1] Field *v.* Adreon, 7 Maryland, 209; Risewick *v.* Davis, 19 Ibid. 82.

[2] Matter of Fitzgerald, 2 Caines, 318. See Greene *v.* Beckwith, 38 Missouri, 384; Leonard *v.* Stout, 36 New Jersey Law, 370; Krone *v.* Cooper, 43 Arkansas, 547.

[3] Barnet's Case, 1 Dallas, 152; Boardman *v.* Bickford, 2 Aikens, 345.

[4] Shugart *v.* Orr, 5 Yerger, 192.

[5] Matter of Wrigley, 8 Wendell, 134; Remarks of Chancellor WALWORTH, s. c. 4 Wendell, 602.

[6] 2 Kent's Com. 431, note; Chesney *v.* Francisco, 12 Nebraska, 626; Swaney *v.* Hutchins, 13 Ibid. 266; Knapp *v.* Gerson, 25 Federal Reporter, 197.

[7] Burrows *v.* Miller, 4 Howard Pract. 349. See Clark *v.* Pratt, 18 Louisiana Annual, 102.

was taken out against a party on the ground of non-residence, the affidavit alleging that he had but just emigrated to this country, and had no permanent residence, except his staying as a boarder and lodger with the plaintiff; it was held, that he was not a non-resident, having left forever his native land, and having no determination to reside elsewhere than where he was at the time the attachment was obtained.[1]

§ 62. On the question of residence, the mode of living is not material, whether on rent, at lodgings, or in the house of a friend. The apparent or avowed intention of *constant* residence, not the manner of it, constitutes the domicile. In inquiries of this sort, minute circumstances are taken into consideration: the immediate employment of the party, his general pursuits and habits of life, his friends and connections, are circumstances which, thrown into the scale, may give it a decisive preponderance.[2] Therefore, where a man came from another place to reside in Pennsylvania, introduced his family there, took a house, engaged in trade, and contracted debts, he was held to be an inhabitant, so as to be the subject of domestic, and not of foreign attachment.[3] So, where an unmarried man came to Philadelphia, took lodgings, and rented a store in the city, where he carried on trade, and frequently declared his intention of taking up a permanent residence in the city, he was considered to be an inhabitant.[4] So, where a resident of the State of New York went thence to Illinois, and purchased there a farm, which he lived upon and cultivated three years, and while living thereon voted in Illinois, and spoke of that State as his residence, and declared his intention to make the farm his permanent home, and said that his wife — who had all the time remained in New York — would join him on the decease of her mother, who was too old to be removed; he was held to be a resident of Illinois.[5] And while a man thus remains, he is to be regarded as a resident of the place, though he avow an intention to withdraw from it;[6] and though he go away, stating that he intends to go to another State, but is absent only a short time, and does not leave

[1] Heidenbach *v.* Schland, 10 Howard Pract. 477. See Brown *v.* Ashbough, 40 Ibid. 260.

[2] Guier *v.* O'Daniel, 1 Binney, 349, note.

[3] Barnet's Case, 1 Dallas, 152; Thurneyssen *v.* Vouthier, 1 Miles, 422.

[4] Kennedy *v.* Baillie, 3 Yeates, 55.

[5] Wells *v.* The People, 44 Illinois, 40.

[6] Lyle *v.* Foreman, 1 Dallas, 480; Bainbridge *v.* Alderson, 2 Browne, 51; Smith *v.* Story, 1 Humphreys, 420; Stratton *v.* Brigham, 2 Sneed, 420; Long *v.* Ryan, 30 Grattan, 718; Hanson *v.* Graham, 32 California, 631.

the State in which he has resided.[1] And so, though he go into another State, to seek another residence. In such case he does not become a non-resident until the fact and intention unite in another abode elsewhere.[2]

§ 63. It follows from these views of what constitutes a resident or inhabitant, that change of abode, *sine animo revertendi*, makes one immediately a non-resident of the place from which he departs.[3] Therefore, where a person resided and carried on business in New York for several years, and becoming embarrassed and unable to pay his debts, determined to leave this country for England, and did actually leave, taking with him his effects, without any intention of returning, he was held to be no longer an inhabitant of New York.[4] So, where one had acquired a residence in Philadelphia, and sailed thence to the West Indies as supercargo of a vessel, taking with him four-fifths of his property, having previously executed an assignment of the rest of it for the benefit of creditors; and engaged in trade in the West Indies, where he was seen by persons who understood from him that he did not intend to return soon, and his letters had been for nine months silent as to his return; he was considered to be no longer an inhabitant of the State, and his property was subjected to a foreign attachment, though when he went away he expressed his purpose to return in twelve or eighteen months.[5] So, where one resided a few months in Philadelphia, and then proceeded to Virginia, whence he sailed for England, in consequence of receiving intelligence of the misconduct of a partner there, but declaring his intention to return in the ensuing spring, it was considered that he had ceased to be an inhabitant of Pennsylvania, and was subject to foreign attachment.[6] So, where a resident of Kentucky stated that he had purchased land in Missouri, and intended to go there in the fall to live; and persuaded an acquaintance to go with him and settle in his neighborhood; and did go away in the fall, and was absent when the suit was brought; it was held sufficient to justify proceeding against him by attachment as a non-resident, though he returned a month after the suit was brought.[7] So, where one left Indiana

[1] Shipman *v.* Woodbury, 2 Miles, 67; Wheeler *v.* Degnan, 2 Nott & McCord, 323.

[2] Pfoutz *v.* Comford, 36 Penn. State, 420; Reed's Appeal, 71 Ibid. 378; Smith *v.* Dalton, 1 Cincinnati Sup. Ct. Reporter, 150.

[3] Moore *v.* Holt, 10 Grattan, 284; Whitly *v.* Steakly, 3 Baxter, 393.

[4] Matter of Wrigley, 4 Wendell, 602; 8 Ibid. 134.

[5] Nailor *v.* French, 4 Yeates, 241.

[6] Taylor *v.* Knox, 1 Dallas, 158.

[7] Farrow *v.* Barker, 3 B. Monroe, 217.

under false pretexts, leaving his family ignorant of the cause of his flight, and the place of his destination; and was absent for more than two months, when a suit by attachment was brought against him as a non-resident; and was gone about a year altogether, and during that time was in Nevada; and there was nothing showing an intention to return, but circumstances authorized the contrary inference; it was held, that it might be inferred that he had left Indiana and located in Nevada, with the intention of making his home in that Territory.[1] So, where one went from Philadelphia to the West, with a view to select a place for future residence, and took a farm in Illinois, and sent for his wife and family, he was held to have changed his residence, though his family temporarily remained behind.[2]

§ 63 *a*. As a change of abode, *sine animo revertendi*, is necessary to make one a non-resident of the place from which he departs, it follows that the enlistment of one in the volunteer military service of the United States, or his being drafted into it, and his departure from the place of his domicile to a point out of the State, in the performance of military duty, with an intention to return, at the expiration of his term of service, to his former abode, cannot have the effect of making him a non-resident.[3]

§ 64. When an individual departs from his place of abode in one State, with the intention of taking up his residence in another State, at what point of time is he to be regarded as a non-resident of the State in which he has been domiciled? Can he be so considered before he passes the boundary of that State? This question arose in Virginia, under a statute authorizing an attachment "against a person who is not a resident of this State." The defendant left Winchester at nine o'clock, A. M., and went by railroad to Harper's Ferry, where he remained until between half-past two and three o'clock, P. M., when he took the cars for Baltimore, intending to go directly on to Philadelphia, where he purposed residing. Between ten and eleven o'clock, A. M., of that day, an attachment was taken out and immediately executed. The point was raised whether, at that time, the defendant, being still within the limits of the State, had become a

See Ritter *v.* P. M. L. Ins. Co., 32 Kansas, 504.

[1] McCollem *v.* White, 23 Indiana, 43.

[2] Reed *v.* Ketch, 1 Philadelphia, 105.

[3] Tibbits *v.* Townsend, 15 Abbott Pract. 221.

non-resident; and the Court of Appeals held that he had.[1] But a mere purpose to change residence, though evidenced by acts of removal of the party's property, will not make him a non-resident of the State from which he purposes to depart, until he shall have begun, at least, the removal of his person. Thus, in New Jersey, where the defendant had moved his goods and chattels out of the house he had been occupying to a canal-boat, with the intention of taking them and his family to another State; and while some of the goods were on the boat, some on the wharf, ready to be put on board, and others on the premises, and *in transitu* from the premises to the boat, an attachment was taken out on the ground that he was "not resident in this State at this time;" the court held, that at most there was but an *intention to remove*, which, without the fact of an actual removal, did not make the defendant a non-resident.[2]

§ 65. The Court of Appeals of New York recognized the compatibility of domicile in that State with actual non-residence, so as to authorize the party to be proceeded against by attachment as a non-resident, even when the intention to return existed, and there was no abandonment of domicile. This was only an extended application of the doctrine held in that State, in the case above cited,[3] as applied to *absent* debtors. In the case now referred to the defendant was proceeded against as a *non-resident*. On his behalf it was offered to be proved, that he was not a non-resident of New York when the attachment was taken out, but a resident thereof; and that he had been absent about three years, attending to a lawsuit at New Orleans, and returned thence to New York after the attachment was obtained. This evidence was excluded by the judge, because the offer itself showed the defendant to be a non-resident at the time the attachment issued; and the Court of Appeals sustained this ruling, and held that the defendant was a non-resident when the attachment issued, although domiciled in New York.[4] The doctrine

[1] Clark *v.* Ward, 12 Grattan, 440. See Spalding *v.* Simms, 4 Metcalfe (Ky.), 285. In Kansas it was held, contrary to the Virginia doctrine stated in the text, that the defendant, though on his way to reside in another State, could not be considered a non-resident of Kansas until he actually left its territory. Ballinger *v.* Lantier, 15 Kansas, 608.

[2] Kugler *v.* Shreve, 4 Dutcher, 129.

[3] Matter of Thompson, 1 Wendell, 45.

[4] Haggart *v.* Morgan, 1 Selden, 422. See Frost *v.* Brisbin, 19 Wendell, 11; Burrill *v.* Jewett, 2 Robertson, 701; Weitkamp *v.* Loehr, 53 New York Superior Ct. 79. *Sed contra*, Brundred *v.* Del Hoyo, Spencer, 328. See remarks of ROOSEVELT, J. in Hurlbut *v.* Seeley, 11 Howard Pract. 507.

of this case, is, substantially, held in Pennsylvania,[1] New Jersey,[2] Maryland,[3] North Carolina,[4] Mississippi,[5] Wisconsin,[6] and Minnesota.[7]

§ 66. The legal residence of a wife follows that of her husband, though she may not actually reside at the place of his domicile; and hence she may, conjointly with her husband, be proceeded against by attachment, as a non-resident of the State in which she actually resides, if he be a resident of another State. This was held in a case where the wife was, before marriage, a resident of New Jersey, and was married there to a resident of New York. After the marriage they went to Europe, and during their absence an attachment was sued out against them as non-residents, for a debt contracted by the wife *dum sola*. It was her intention, when she went abroad, to return to her place of residence in New Jersey and continue her residence there for a time, and on her return she carried out that intention; her husband visiting her on Saturdays, coming for that purpose from New York, where he did business, and returning the next week to New York. She was held to be a non-resident of New Jersey, so as to authorize the attachment.[8]

§ 67. The remedy by attachment against a non-resident is not annulled or suspended by his accidental or transient presence within the State;[9] nor by his becoming a resident of the State after levy of the attachment;[10] nor by the fact that he has a commercial domicile — that is, is engaged in business — therein, when his personal domicile is in another State.[11] Therefore

[1] Eberly *v.* Rowland, 1 Pearson, 312.

[2] Weber *v.* Weitling, 18 New Jersey Eq. 441. In Stout *v.* Leonard, 37 New Jersey Law, 492, it was held that a man can have but one domicile for one and the same purpose at any one time, though he may have numerous places of residence. Therefore where one had a place of residence in New Jersey for the summer, and one in New York for the winter, it was decided that he could be proceeded against as a non-resident of New Jersey whenever he was absent from that State.

[3] Risewick *v.* Davis, 19 Maryland, 82; Dorsey *v.* Kyle, 30 Ibid. 512.

[4] Wheeler *v.* Cobb, 75 North Carolina, 21.

[5] Alston *v.* Newcomer, 42 Mississippi, 186; Morgan *v.* Nunes, 54 Ibid. 308.

[6] Wolf *v.* McGavock, 23 Wisconsin, 516.

[7] Keller *v.* Carr, 40 Minnesota, 428.

[8] Hackettstown Bank *v.* Mitchell, 4 Dutcher, 516.

[9] Bryan *v.* Dunseth, 1 Martin N. S. 412; Jackson *v.* Perry, 13 B. Monroe, 231; Burcalow *v.* Trump, 1 Houston, 363; Greene *v.* Beckwith, 38 Missouri, 384; Perrine *ads.* Evans, 35 New Jersey Law, 221.

[10] Larimer *v.* Kelly, 10 Kansas, 298.

[11] Rayne *v.* Taylor, 10 Louisiana Annual, 726; Greene *v.* Beckwith, 38 Missouri, 384; Malone *v.* Lindley, 1 Philadelphia, 192; Wallace *v.* Castle, 68 New York, 370; Cooke *v.* Appleton, 51 New York Superior Ct. 529.

where a defendant had all his business and property in the State of New York, and all his business capital and his bank account in the city of New York, where he was engaged in business, and where he spent on an average eight hours of every business day; but for reasons of convenience and economy maintained his family in Jersey City, in the State of New Jersey, and spent with them there his nights and Sundays; it was held, that he was not a resident of the State of New York.[1]

§ 68. *Debtors removing their Property.* In many of the States statutory provisions exist authorizing attachments to issue, where a debtor is about to remove his property out of the State, or to dispose of it so as to defraud his creditors. We will give attention to the cases which have arisen under provisions of this description.

§ 69. In Louisiana, under a statute authorizing an attachment where "the debtor is about to remove his property out of the State before the debt becomes due," it was decided that the statute must be understood to apply to property which the creditor might have supposed would not be carried out of the State, and to which he might have looked for his security at the time of contracting, or since; but that it would be unreasonable to extend it to a species of property which, from its nature and destination, must necessarily be taken out of the State, and which the creditor could not have believed would remain continually within its limits. Therefore, where a debtor was the owner of a steamboat, which he had purchased from the plaintiff, and for part of the purchase-money had given notes to the plaintiff, secured by a mortgage on the boat, which notes were not yet due; and after the giving of the notes, he had been running the boat regularly in a particular trade, which necessarily took her out of the State; it was considered, that the fact of the defendant being about to take her away on one of her regular trips, without any fraud or intention to defraud being alleged, was not sufficient to justify an attachment, on the statutory ground above cited.[2] And so in a similar case in

[1] Barry *v.* Bockover, 6 Abbott Pract. 374. See Potter *v.* Kitchen, Ibid. 374, note; Lee *v.* Stanley, 9 Howard Pract. 272; Houghton *v.* Ault, 16 Ibid. 77; Chaine *v.* Wilson, Ibid. 552; 8 Abbott Pract. 78; 1 Bosworth, 673; Murphy *v.* Baldwin, 41 Howard Pract. 270; 11 Abbott Pract. N. S. 407; Towner *v.* Church, 2 Abbott Pract. 299; McKinlay *v.* Fowler, 1 Howard Pract. N. S. 282; Coffin *v.* Stitt, 5 New York Civil Procedure, 261.

[2] Russell *v.* Wilson, 18 Louisiana, 367. See Montgomery *v.* Tilley, 1 B. Monroe, 155; Lyons *v.* Mason, 4 Coldwell, 525.

Wisconsin. The affidavit alleged that "the defendant is about fraudulently to remove, convey, or dispose of his property, so as to hinder the plaintiff from collecting his said debt;" and added, as "reasons and circumstances upon which the belief of the above facts is founded, that the defendant is now on his way down the Wisconsin river with a large raft of pine lumber, bound for the southern market, and is now removing the same out of this Territory; and that said lumber is all the property said defendant owns in said Territory, or elsewhere to the knowledge of affiant." The affidavit was held bad; and the court said: "When the fact 'that a defendant is about fraudulently to remove, convey, or dispose of his property to hinder or delay his creditors,' is a ground for proceeding in attachment, the facts stated to sustain the position should show that the defendant is so acting with his property, out of its ordinary and necessary use, as to produce the reasonable conviction that a fraudulent disposition thereof is intended. To state in the affidavit circumstances showing that defendant is using his property in the only way in which it could be of any value whatever, and strictly conforming to the usages and customs observed in that line of business by persons so engaged, furnishes no ground whatever to authorize the writ of attachment."[1] In Iowa an attachment was obtained on the ground that "the defendant is about to remove his property out of the State, without leaving sufficient remaining for the payment of his debts." On a counter-claim in the attachment suit, to recover damages for the wrongful issuing of the attachment, it appeared that the property which the defendant was about to remove out of the State was a team of horses, wagon, and harness, with which he habitually earned his living as a farmer; and that the removal was only a temporary one, for the purpose of conveying him on a journey into another State, from which he intended to return; and it was held not to justify the attachment; the statute being considered to contemplate a permanent removal, and not a temporary use of the property out of the State.[2]

§ 70. In Illinois, where the statute authorized an attachment when the debtor "is about to remove his property from this State to the injury of such creditor," an attachment was obtained on that ground against two debtors, and levied on a quantity of pig-iron, which was all the personal property owned by the defend-

[1] Hurd v. Jarvis, 1 Pinney, 475. [2] Warder v. Thrilkeld, 52 Iowa, 134.

ants in the county, at the time the writ issued. The defendants filed a plea in abatement, traversing the allegation of the affidavit. On the trial of this plea, they offered to prove that one of them owned a large amount of personal property in the State, free from any incumbrance, and more than sufficient to discharge the plaintiff's demand. The court excluded this evidence; but the Supreme Court held this exclusion to be erroneous. They considered that, not only must there be a removal of the property of the defendants, but it must be to the injury of the plaintiff; and that the proof offered was competent, as tending to show that the removal would not operate to the plaintiff's injury.[1]

§ 70 *a*. In Mississippi, an attachment was obtained on the ground that the defendant was "about to remove his property out of this State." The defendant pleaded in abatement, denying the allegation of the affidavit. On the trial under this plea, it appeared that the defendant, in pursuance of a previously expressed purpose, had removed a part of his property to Louisiana, but that at the time of the attachment he had, in Mississippi, real and personal property, more than sufficient to pay all his liabilities in that State, which he did not remove, or intend to remove. The court held that in such case an attachment would not lie, and the grounds of its decision were thus stated: "The object of the statute is to afford to the creditor a security for his debt, in case the debtor is about to remove his property out of this State, so as to deprive the creditor of the collection of his debt in this State. The principle upon which the statute proceeds is *the danger of loss of the debt by the removal of the defendant's property;* and this reason fails, and the remedy provided by the statute plainly does not apply, where the debtor is removing a part of his property, but does not remove, or intend to remove, another part of it, subject to the payment of the debt, amply sufficient to satisfy it, and accessible to the creditor's execution, and such portion of his property remains in his possession openly subject to execution. For, when property to such an amount, and so situated, remains in the possession of the debtor, and is not about to be removed from the State, it could not be justly said that the creditor's debt would be in danger of being lost, by the removal of another part of the debtor's property from the State."[2] Similar views were ex-

[1] White *v.* Wilson, 10 Illinois (5 Gilman), 21; Ridgway *v.* Smith, 17 Ibid. 33.

[2] Montague *v.* Gaddis, 37 Mississippi, 453.

pressed by the Supreme Court of Florida.[1] And so in Alabama, under a statute authorizing attachment "when the defendant is about to remove his property out of the State, so that the plaintiff will probably lose his debt, or have to sue for it in another State."[2] In any such case it is not required of the plaintiff to prove that the removal was made with a *fraudulent intent* on the part of the defendant;[3] nor is he required to prove that the defendant did not have sufficient property remaining in the State to meet all his liabilities. By proving the removal of a part of his property, the *onus* is thrown on the defendant to show that he has ample visible property remaining in the State to answer the demands of all his creditors.[4]

§ 71. In Tennessee, under a law allowing an attachment where a debtor "is removing, or about to remove himself or his property beyond the limits of this State," an attachment was obtained against the owner of a steamboat, on the allegation that he was "about to remove the said steamboat beyond the limits of this State." The court intimated that the designation of only a particular piece of property as about to be removed, if it stood alone, would not be sufficient to authorize the attachment; and that the affidavit ought to use the words of the statute, or should exclude the idea that other property might still be left by the defendant, within the jurisdiction, amply sufficient to satisfy the demand; but considering the allegation that the defendant was about to remove his boat equivalent to the assertion that he was about to remove himself, the attachment was sustained.[5]

In the same State, an attachment was obtained on the ground that "the defendent was about to remove his property out of the State," and issue was made on that allegation; on the trial of which three questions arose: 1. Whether it was competent testimony to prove that the defendant removed his property out of the State *soon after* the suing out of the attachment? 2. What constituted a *removal* within the meaning of the statute? and 3. What amount of property would meet the requirement of the issue? On the first point, the court said that the evidence was competent, as tending to prove the previous intention to remove. On the second point, that the mere taking of the property out of the State for a temporary purpose was not such a removal as the

[1] Haber *v.* Nassitta, 12 Florida, 589.
[2] Stewart *v.* Cole, 46 Alabama, 646.
[3] Pickard *v.* Samuels, 64 Mississippi, 822.
[4] Stephenson *v.* Sloan, 65 Mississippi, 407.
[5] Runyan *v.* Morgan, 7 Humphreys, 210.

statute contemplated. On the third point, the court said: "It is not possible to define by precise words the amount of property about to be removed which will bring the debtor within the scope of the statute. It need not be all his property, nor will a comparative little suffice. It must be an amount of substantial consequence in reference to the ability of his estate to bear honestly the withdrawal of the amount away from his liability, in the domestic court, to his creditors. . . . It is not necessary, to sustain the issue of *is about to remove*, to show that the debtor is about to do this of any dishonest, or fraudulent, or injurious purpose towards the attaching or any other creditor. The statute does not make fraud, or dishonesty, or intentional injury to the attaching or any creditor an element of the issue *is about to remove*. The being about to remove is one element, and the property is another, and these two being shown maintains the issue."[1]

§ 71 *a*. In Arkansas the statute authorizes an attachment where a debtor "is about to remove, or has removed, his property or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim, or the claim of said defendant's creditors." Under this statute, it was held, by the U. S. Circuit Court for the Eastern District of Arkansas, that an attachment lay against a merchant who did not have property enough to pay his debts, and who invested a material portion of his assets in cotton, and shipped it out of the State; though he and other merchants were in the habit of making such investments and shipments; and though it did not appear that the shipment was made with a fraudulent intent or for a fraudulent purpose.[2] But in a case under the same statute, the Supreme Court of Arkansas held, that attachment would not lie against a debtor who, in good faith and with no intent to defraud creditors, shipped cotton to New Orleans in payment of a debt he owed to the consignee.[3]

§ 71 *b*. *Debtors fraudulently disposing of their property.* In many States an attachment is authorized on affidavit that the defendant has made, or is about to make, some fraudulent disposition of his property. The particular terms of the different statutes on this subject are set forth in the Appendix, and will not be referred to here, except in connection with the reported cases.

[1] Friedlander *v.* Pollock, 5 Coldwell, 490.

[2] Mack *v.* McDaniel, 2 McCrary, 198; 4 Federal Reporter, 294. See Durr *v.* Hervey, 44 Arkansas, 301.

[3] Rice *v.* Pertuis, 40 Arkansas, 157.

In such cases it may be stated as a rule, that on the trial of an issue made by a traverse of the allegations of the affidavit, the plaintiff is not required to prove that the person to whom the defendant had disposed of, or was about to dispose of, his property, with intent to defraud his creditors, had the same intent in obtaining it, or participated in any degree in the defendant's intent. It is the intent of the defendant alone that is in question.[1]

In statutes of this description there is always one phrase, — "his property," — the scope of which should be examined. This was done by the Supreme Court of New York, in a case where the ground of the attachment was, that the defendant had stolen, secreted, or embezzled money of the plaintiff to the amount of $5,000 and upwards; that he said he had deposited part of the proceeds in the name of a little sister, and acknowledged that he did this to avert suspicion, and to prevent the property being taken from him, and to conceal it. It was contended that an attachment did not lie, because the property which he so concealed was not his; but the court sustained the attachment, and said: "The Code speaks of the secreting of the *defendant's* property. By that was meant any property in his possession, and to which he claimed title, although his title was imperfect or clearly bad. The injury to the creditor, and the intent to defraud, are as clearly shown in that case, as if the defendant had a perfect title to the property."[2]

§ 71 *c*. An attachment cannot be sustained, on the allegation that the defendant has made, or is about to make a fraudulent disposition of his property, unless the property be of such nature and in such situation that, if judgment be rendered in favor of the attachment plaintiff, it may be taken under execution. Therefore, no disposition by a debtor of property exempt by law from seizure for the payment of his debts, can be any ground for an attachment.[3] Thus, if he have in his personal possession money paid to him as a United States pensioner, every court which considers that section 4747 of the U. S. Revised Statutes protects that money from his creditors so long as it remains in his own hands, will hold, as was held in Pennsylvania, that his giving it away was no fraud upon his creditors, justifying resort to attachment.[4]

[1] Miller *v.* McNair, 65 Wisconsin, 452.

[2] Treadwell *v.* Lawlor, 15 Howard Pract. 8.

[3] Prout *v.* Vaughn, 52 Vermont, 451.

[4] Clark *v.* Ingraham, 15 Philadelphia, 646. See Fisher *v.* Williams, 56 Vermont, 586.

§ 72. In Missouri, an attachment was issued on affidavit that the defendant had fraudulently conveyed, assigned, concealed, and disposed of his property and effects, so as to hinder, delay, and defraud his creditors. The defendant pleaded in abatement, traversing the allegations of the affidavit. On the trial it appeared that, just before the attachment issued, the defendant had sold his entire stock of goods to a person to whom he was indebted, for the purpose of paying his debt; and it was held, that unless the vendees were parties to the fraud, such a sale was not to be considered fraudulent, although the defendant, about the time it was effected, made false representations as to his condition and intentions.[1]

§ 73. In the same State this case arose. An attachment was sued out, on the ground that the defendant "had fraudulently conveyed, assigned, removed, concealed, and disposed of his property and effects, so as to hinder, defraud, and delay his creditors, and that he was about to do those things." A plea in abatement put in issue the truth of the affidavit. On the trial it appeared that the defendant, being indebted to the plaintiff and others, was permitted by them to take a certain amount of goods, under a written agreement to make a weekly account of his sales, and pay over the proceeds, after deducting certain charges; and that he made on one occasion a considerable sale of goods for cash, of which he made no return. The court instructed the jury that "the concealment contemplated by the statute means secreting goods, and not concealment of circumstances, or misrepresentation of facts, and that this last-mentioned conduct is no ground for issuing an attachment." This was held by the Supreme Court to be erroneous. "That instruction," said the court, "declares that the concealment referred to in the statute must be a concealment of goods, and not of facts and circumstances. This distinction we confess ourselves unable to appreciate. If the defendant had packed away in his cellar goods to the value of one thousand dollars, with a view to defraud his creditors and prevent them from collecting their debts, this is conceded to be a fraud within the meaning of the statute; but if he sells the same goods, and puts the money in his pocket, with the same intent of cheating his creditors by the operation, it is regarded as a mere concealment of circumstances, we suppose, and therefore not such a concealment as is reached by the attach-

[1] Chouteau v. Sherman, 11 Missouri, 385. See Knapp v. Joy, 9 Missouri Appeal, 47.

ment law. The statute uses the phrase 'goods and effects.' The money for which the goods were sold by the defendant was as capable of being concealed as the goods were, and the concealment of the money is surely not less a fraud, because it was accompanied with a concealment and misrepresentation of facts and circumstances."[1] But a mere denial of having received the money, whether true or false, is not concealment of it.[2]

§ 74. An attachment was obtained in Missouri, on the ground that the defendant had fraudulently conveyed his property, and was about to conceal or dispose of his property so as to hinder and delay his creditors. The defendant denied these allegations. On the trial, it was shown that he had, previous to the issue of the attachment, confessed a judgment in favor of another party, upon which execution was issued, and when the sheriff went to defendant's store to levy the same, he found there the execution plaintiff, who, after some conversation with the defendant, instructed the sheriff to suspend a levy until further orders; and that nothing was done under the execution, until the attachment was placed in the hands of the sheriff, when the execution plaintiff directed a levy. This was held by the court to be a fraudulent disposition of his property by the defendant; and it was further held, that the declarations of the execution plaintiff in connection with the transaction might be given in evidence against the defendant.[3] But confessions of judgment in favor of *bona fide* creditors, for the mere purpose of preferring them, and not for the purpose of hindering, delaying, or defrauding other creditors, will not sustain an attachment.[4]

In the same State the Supreme Court expressed itself in regard to the scope of the word "disposed," as used in that clause of the statute which authorizes an attachment "where the defendant has fraudulently concealed, removed, or *disposed* of his property or effects, so as to hinder or delay his creditors." Said the court: "The word 'disposed,' as used in this subdivision of the statute was, we think, intended to cover and does cover all such alienations of property as may be made in ways not otherwise pointed out in the statute; for example, such as pledges, gifts, pawns, bailments, and other transfers and alienations as may be effected by mere delivery, and without the use of any writing, assignment, or conveyance. Any and all these transfers and

[1] Powell v. Matthews, 10 Missouri, 49.
[2] Rohan Bro's B. M. Co. v. Latimore, 18 Missouri Appeal, 16.
[3] Field v. Livermore, 17 Missouri, 218.
[4] Estes v. Fry, 22 Missouri Appeal, 80.

alienations of property thus made, if done to hinder or delay creditors, are fraudulent and void within the meaning of the term 'disposed,' as used in this subdivision." [1]

In the same State an attachment was obtained on the ground that the defendant "had fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors." The evidence showed a conveyance by the defendant of a stock of goods to C. to secure and pay debts to R., which conveyance the plaintiff endeavored to show was made fraudulently, so as to hinder and delay his creditors. It was held unnecessary, in order to sustain the attachment, to show that the trustee and the *cestui que trust* acted in bad faith; but that if the defendant acted with a fraudulent intent in making the deed, it was sufficient; and that his statements, made shortly after the execution of the deed, might properly be given in evidence to show the intent with which he made it.[2] And in a subsequent case it was decided, that in making such a conveyance the fraudulent intent must be shown to have existed, in order to sustain the attachment, and that it was not sufficient merely to show that the effect of the conveyance was to hinder and delay creditors.[3]

In Illinois, an attachment was sued out on two grounds, — that the defendant had within two years prior to the filing of the affidavit, fraudulently conveyed and assigned his effects, so as to hinder and delay his creditors; and that he had within the same time fraudulently concealed and disposed of his property, so as to hinder and delay his creditors. The court held, that "fraudulent conveyance" in the statute implied an intent to defraud; and contemplated that the debtor's fraud should be one of fact as contradistinguished from a legal or constructive fraud.[4]

In Arkansas an attachment was obtained on an affidavit that the defendant "had sold or otherwise disposed of his property with the fraudulent intent to cheat, hinder, or delay his creditors;" and it was contended that the disposition of his property made by the defendant was not to avoid the payment of his debt to the plaintiff, which he admitted to be just, but another which he claimed to be unjust; and that was held to justify an attachment of his property by any of his creditors.[5]

In Missouri, an affidavit that two defendants, who were partners, were "about fraudulently to conceal, remove, and dispose

[1] Bullene v. Smith, 73 Missouri, 151.
[2] Enders v. Richards, 33 Missouri, 598.
[3] Spencer v. Deagle, 34 Missouri, 455.
[4] Shove v. Farwell, 9 Bradwell, 256; Dempsey v. Bowen, 25 Illinois Appellate, 192.
[5] Sherrill v. Bench, 37 Arkansas, 560.

of their property and effects so as to hinder and delay their creditors," was held to be sustained by proof that one of them was about so to dispose of the partnership property.[1]

§ 74 *a*. In Missouri, the statute declares that "every conveyance or assignment made or contrived with the intent to hinder, delay, or defraud creditors, shall be deemed and taken to be clearly and utterly void." An attachment was levied on goods belonging to the defendants, which were claimed by other parties who interpleaded therefor, alleging a conveyance of the goods to them. On the trial of the interplea the court instructed the jury, that, before they could deem the conveyance void, they must find that it was made with intent to "cheat, hinder, *and* delay creditors." This instruction was condemned by the Supreme Court, because requiring a triple intent to be found, when if a single intent either to hinder, or delay, or defraud creditors were found, the conveyance was void.[2] This ruling is applicable in any case under an act authorizing an attachment "where the defendant is about fraudulently to convey *or* assign his property *or* effects, so as to hinder *or* delay his creditors." Under such an act an attachment was obtained on an affidavit that "the defendant is about fraudulently to convey *and* assign his property *and* effects, so as to hinder *and* delay his creditors." On a trial of the truth of the affidavit, the jury, in terms, sustained it in this *conjunctive* form. The defendant claimed that the verdict was bad, because it used the word *and* in three places where the word *or* would have been sufficient; that is, because the jury found more than was sufficient to justify the attachment; but the court sustained the verdict, holding that the conjunctive necessarily includes the disjunctive.[3]

§ 74 *b*. In Missouri, where an attachment was obtained on the ground that the defendant was about fraudulently to conceal, remove, or dispose of his property or effects so as to hinder or delay his creditors, it was deemed not necessary to show that he was about so to dispose of *all* his property, but that the attachment would be sustained, if he was about so to dispose of any part of it.[4] And so in Kansas,[5] and Indiana.[6]

[1] Wilson-Obear G. Co. *v.* Cole, 26 Missouri Appeal, 5.

[2] Burgert *v.* Borchert, 59 Missouri, 80; Crow *v.* Beardsley, 68 Ibid. 435. See Pilling *v.* Otis, 13 Wisconsin, 495.

[3] Stewart *v.* Cabanne, 16 Missouri Appeal, 517.

[4] Taylor *v.* Myers, 34 Missouri, 81.

[5] Johnson *v.* Laughlin, 7 Kansas, 359. See Taylor *v.* Kuhuke, 26 Ibid. 132.

[6] Flannagan *v.* Donaldson, 85 Indiana, 517.

§ 75. In New York, under a statute which allowed an attachment to issue, "when it shall satisfactorily appear to the justice that the defendant is about to remove from the county any of his property, with the intent to defraud his creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his property with the like intent," an attachment was issued, on affidavits specifying several causes, among which was, that the defendant was about to dispose of his property with intent to defraud his creditors. The affidavit assigned the existence of the following facts as evidence of that intent: that the defendant left the county of Chemung two months before, and went to the province of Upper Canada, with intent to remain there, and had taken with him some portion of his personal property; that he had no family, and but little property; that he was offering his property in Chemung county for sale; that he told the plaintiff that he would be damned glad if he ever got his pay of him; that no civil process could be served on him, because he kept out of the State; and that he refused to pay anything on the plaintiff's debt. It was held, that these facts proved a strong case of *intent* to dispose of property to defraud creditors.[1]

In the same State an attachment was obtained, on the ground that the defendant was "about to assign or dispose of his property with intent to defraud his creditors." In support of the attachment, evidence was given of threats of the defendant to make an assignment of his property, and that plaintiff would get nothing, and to put his property out of his hand sooner than pay more than one third of his debts; and on the plaintiff's refusing to take less than the amount of his claim, the defendant threatened to go home and put his property out of his hands. In the Supreme Court, at Special Term, INGRAHAM, J. held this evidence to warrant the presumption of a fraudulent intent;[2] but at General Term this decision was reversed, on the ground that the threat of the defendant to make an assignment of his property, was a threat to do a lawful act; and that the attachment could not be sustained without presuming an evil intent, which is contrary to the principle that we are not to presume wrong until wrong is plainly indicated; and that the conduct of the defendant in subsequently making a legal and valid assignment of his property, was a fact to be considered as indicating the intent of the previous threat.[3] But in a subsequent similar case,

[1] Rosenfield v. Howard, 15 Barbour, 546.

[2] Wilson v. Britton, 6 Abbott Pract. 33.

[3] Wilson v. Britton, 6 Abbott Pract.

where it appeared that the defendant's assets were more than sufficient to pay all the other claims against him than that sued on, *and that he only wanted time to pay all his debts*, it was held, that the threatened assignment must have been intended to be fraudulent, or an instrument of fraud; and the attachment was sustained.[1] And where a debtor refused to pay his note on demand, and was told by the creditor that he would be sued; and he thereupon threatened, if he was sued, "to turn over all his property, and that the creditor would n't get a cent;" it was held, that this threat evidenced an intention to dispose of his property so as to baffle the creditor in the speedy collection of his debt, and the attachment was sustained.[2] It will be observed that this case differs from those just referred to in this connection, in that the threat was not to put his property out of his hands by making an assignment. This difference was recognized by the court, which said that cases in which the only threat was to make merely a lawful assignment were inapplicable to this case.

In the same State it appeared that the defendant, a married woman debtor, when called upon, on several occasions, to pay the plaintiff, put it off, saying that her husband every night took all the money which she had received during the day, and paid it to persons from whom she had bought goods; but it was proved that he did not pay those persons. The court said: "It stands conceded that the defendant has allowed her husband to take possession of all her money, and has made a false statement of the purpose for which it was appropriated. No other inference can be drawn than that such disposition of the defendant's money to her husband, coupled with a falsehood as to the purpose for which he took it, was made with intent to defraud her creditors, whom she put off upon the false pretext which she assigned. The defendant, therefore, is amenable to the charge of having 'disposed of' her 'property with intent to defraud' her creditors."[3]

In the same State, the question arose whether the allegation on which the attachment was obtained, to wit: "that the defendants had disposed, and were about disposing, of their property, with the intent to defraud their creditors," was sustained by the

97; Dickinson v. Benham, 10 Ibid. 390; 12 Ibid. 158; 19 Howard Pract. 410; Evans v. Warner, 28 New York Supreme Court, 574; Farwell v. Furniss, 67 Ibid. 188.

[1] Gasherie v. Apple, 14 Abbott Pract. 64.

[2] Livermore v. Rhodes, 27 Howard Pract. 506.

[3] Anderson v. O'Reilly, 54 Barbour, 620.

facts set forth in the affidavit. Those facts were, that when the goods were purchased by the defendants from the plaintiff, on account of which the suit was brought, the defendants stated that they had $25,000 cash capital in their business, over all their debts and liabilities; that they had other property in addition, which made them worth $40,000, and that they were doing a cash business; that a few weeks thereafter, when their indebtedness to the plaintiff became due, they declared that they had no money, and had not had any for many days, except what they had borrowed, and that they did not know whether they were solvent or not; that, within a month prior to this time, their stock of goods had amounted to $20,000, but that it had now suddenly become reduced in amount to $2,000, which they were then packing up and removing; and within the same space of time they had secretly removed many thousand dollars' worth of goods from their store, and sent them to four distant places, all directed to a brother of one of the defendants. The court held the affidavit sufficient to authorize the attachment.[1] In the same State it was held that the fact that the alleged fraudulent disposition of the defendant's property was made in another State did not deprive the New York courts of the power to grant an attachment for that cause.[2] And in Florida, where it was alleged in an affidavit that a firm was fraudulently disposing of property in that State, and also that one partner absconds and the other is a non-resident, the latter facts were considered as inconsistent with the former allegation.[3]

§ 75 *a*. In the United States District Court for Oregon an attachment was obtained on the ground that the defendant was "about to assign or dispose of his property with intent to delay or defraud his creditors." Upon a motion to dissolve the attachment, evidence was given tending to prove that the defendant had previously assigned his property to his creditors in Oregon, primarily, for the purpose of preventing the collection of the claims of the attaching creditors, who were citizens of Ohio; and that if sued upon the claims of the latter, he would again make some disposition of his property to prevent them from making anything on execution, if they obtained judgment against him. The court, considering that a *prima facie* case

[1] Talcott *v.* Rozenberg, 2 Daly, 203. See Van Loon *v.* Lyon, 4 Ibid. 149.

[2] Kibbe *v.* Wetmore, 38 New York Supreme Ct. 424.

[3] Tanner & D. E. Co. *v.* Hall, 22 Florida, 391.

had been made out, held, that if a defendant intends, or it appears probable that he intends, to dispose of his property, for the purpose of delaying or defrauding these particular plaintiffs, that is a good cause for attachment by them; and, in answer to the objection by defendant's counsel, that proof of a *general* intent on the part of the defendant to prevent the collection of the particular debts sued on, was not sufficient to sustain the allegation that the defendant *is now* about to dispose of his property, with intent, &c., the court said: "This is a distinction without a difference. That which a person intends to do generally, it may be properly said he is about to do, ready to do, whenever the particular occasion for doing so occurs. The bringing of these actions was such an occasion in these cases. If a plaintiff, under such circumstances, must wait for an attachment until the defendant is apprised of the commencement of the action, and begins to carry out his general intent, by disposing of his property, he may as well not have it at all." [1]

§ 76. Where an attachment in chancery was obtained, on the complainant alleging his belief that the defendant would sell, convey, or otherwise dispose of his property, with the intent to hinder, delay, and defraud the complainant, unless prevented by attachment; it was held, that the fraudulent intent must be shown to have existed before the suing out of the attachment; and that to prove it to have originated afterwards was not sufficient. [2]

§ 77. In Iowa, under an affidavit that "the defendant *is* in some manner about to dispose of or remove his property with intent to defraud his creditors," evidence of acts done by him ten years before, in another State, was held not admissible or relevant to prove the truth of the affidavit. "However competent such evidence might be," said the court, "if the plaintiff had first given testimony of any fact or facts, which would tend directly to establish on his part the issue joined, in order to strengthen the evidence, certainly, until some ground in fact, upon the issue thus joined, had been laid for its operation, it was inadmissible, being irrelevant. To allow such facts to be resuscitated after the lapse of ten or twelve years, and made the gravamen of a legal proceeding such as this, would be pushing

[1] Haizlette v. Lake, 1 Deady, 469. [2] Warner v. Everett, 7 B. Monroe, 262.

the severity of the attachment law to an extreme never contemplated by the legislature."[1]

§ 77 *a*. In Minnesota, an affidavit alleging that "the defendant is about to dispose of his property with the intent to hinder, delay, and defraud his creditors," was considered not to be sustained by showing that the defendant, who was insolvent, was about to sell for a fair price his property, consisting of an exempt homestead, and other real estate, with the purpose and intent to apply all the proceeds, less a part of the price received for the homestead, to pay his just debts owing to a portion of his creditors. The court held, that those facts afforded no just grounds for inferring that he was about to dispose of the property with the intent to defraud other creditors; and that the delay in paying the plaintiff, which might result from the defendant's paying the other creditors, was not such a delay as the statute contemplated.[2] And in Missouri, an attachment obtained on the ground that the defendant had fraudulently concealed, removed, or disposed of his property or effects, so as to hinder or delay his creditors, was not sustained by evidence that he had sold property to enable him to get money to pay honest debts, and to obtain the necessaries of life,[3] though the effect thereof may have been to delay or hinder other creditors in the collection of their claims.[4]

§ 77 *b*. In Indiana, an attachment is authorized where a debtor "has sold, conveyed, or otherwise disposed of his property subject to execution, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors." Under this statute an attachment was obtained on an affidavit that the defendant "has sold, conveyed and otherwise disposed of her certain real estate to her son, I. M. D., he, the said I. M. D., colluding with the said defendant, with the fraudulent intent to cheat, hinder, and delay her creditors, which said real estate, so sold as aforesaid, was as follows, to wit" (description given). On a trial of an issue on the affidavit it was held, that if the affidavit was sustained by the evidence, it was sufficient to sustain the attachment; and that it was not necessary to that end for the plaintiff to show that the defendant, after making the conveyance, did not retain sufficient property to pay her debts.[5]

[1] Lewis *v.* Kennedy, 3 G. Green, 57.
[2] Eaton *v.* Wells, 18 Minnesota, 410.
[3] Estes *v.* Fry, 22 Missouri Appeal, 80.
[4] Saddlery Co. *v.* Urner, 24 Missouri Appeal, 534.
[5] Flannagan *v.* Donaldson, 85 Indiana, 517.

§ 77 *b b*. In Wisconsin, it was held, that the fact that an insolvent debtor executed to one of his creditors a mortgage to secure a greater sum than he owed him, was sufficient to sustain the allegation in the affidavit that the defendant "had assigned, conveyed, and disposed of a part of his property with intent to defraud his creditors."[1] And in the same State it was held, that the use of the money of an insolvent firm by one of the partners, to pay his individual debts, with the assent of the other partner, had the same effect.[2]

§ 77 *b b b*. In every case where an attachment is obtained on the ground that the debtor is about to dispose of his property with intent to defraud his creditors, and issue is taken on the affidavit alleging such intent, all acts of his tending to show such intent may be proved and considered, whether done before or after the attachment; and it is for the jury to say, in the light of the attending circumstances, whether his subsequent acts tended to show the intent alleged. If they are accounted for by the suing out of the attachment, or other circumstances happening thereafter, then they would not tend to establish the intent charged; otherwise, they would.[3]

§ 77 *c*. *Debtors who fraudulently contracted the debt or incurred the obligation sued on.* In several of the States an attachment may be obtained on the ground of fraud on the part of the debtor in contracting the debt sued on; and decisions have been rendered in cases of that description.

In Mississippi, an attachment may issue on affidavit that the defendant "fraudulently contracted the debt, or incurred the obligation, for which suit has been or is about to be brought." In a case there, under that provision, the principal facts were these: S., a merchant in Lexington, Miss., October 20, wrote to E. M. & Co., shoe-dealers in New Orleans, enclosing an order for shoes to the amount of $349.50, promising to send them a sight draft on receipt of the goods. Relying on this assurance they shipped the articles, and wrote that, remitting, he could deduct five per cent for cash. No answer came, and on the 3d of December, E. M. & Co. wrote again, suggesting that he had probably overlooked the matter. December 24, he wrote them

[1] Rice *v.* Morner, 64 Wisconsin, 599; Butts *v.* Peacock, 23 Ibid. 359.

[2] Keith *v.* Armstrong, 65 Wisconsin, 225.

[3] Mayne *v.* C. B. Savings Bank, 80 Iowa, 710.

that, owing to bad weather and miserable roads, he was unable to ship his cotton, and therefore did not send the draft; but he had no intention to keep them out of their money, and thought he would be able to ship in a week or ten days, when he would remit. The sight draft was not sent. In February succeeding, an attorney presented the bill to S., who asked and obtained further time. April 4, E. M. & Co. obtained an attachment on the ground above stated. S. traversed the ground, and a trial was had, the history of which is too extended for insertion here. The Supreme Court held, among other positions, two of controlling importance; 1. That to make good the allegation that the debt was fraudulently contracted there must have been on the part of S. a *purpose to defraud;* and that purpose would have appeared if it had been shown that S., when he made the promise to send the sight draft, entertained the purpose not to send it as promised. 2. That proof of any belief which S. may have had, when he sent the order for the goods, that he would be able to pay for them as promised, did not acquit him of the charge of fraud; for to hold that would leave out the idea of his intention not to pay for them as promised, which should have been left open to inquiry. 3. That false representations made by S., *after* contracting the debt, that he had property from the proceeds of which he would pay, did not make the debt fraudulently contracted.[1]

In Nebraska this case arose, under a statute of identical import with that of Mississippi just referred to. One C., a member of the firm of C. & Co., of Lincoln, Nebraska, went to Chicago and arranged with Y. & Co. to purchase stock for them in Nebraska, and draw on them for the necessary advances. C. then returned to Lincoln, drew a draft on Y. & Co. for $2,000, and wrote to them that he had purchased 125 hogs, and would have 200 by Saturday night. Upon these representations the draft was paid. C. & Co. then sold the hogs to other parties. The court had no doubt that there was a deliberate purpose on the part of C. to commit a fraud upon Y. & Co, and the attachment was sustained.[2]

In Wisconsin, under a similar statute, an attachment was sustained in a case in which the facts were these: W., a merchant in Wisconsin, desired to purchase goods on credit of R. & Co., merchants in Chicago. Before giving him credit they required him to furnish them an itemized statement of his financial con-

[1] Marqueze v. Sontheimer, 59 Mississippi, 430.

[2] Young v. Cooper, 12 Nebraska, 610.

dition and resources; in which he stated his indebtedness at $2,500; and on that basis his statement made the excess of his assets over his liabilities a little more than $9,000. On the receipt of this statement, R. & Co. gave him the desired credit. Afterwards they obtained an attachment against him on the ground that he had fraudulently contracted the debt sued on. On a traverse of the affidavit he testified that when he made the statement he owed for merchandise from $7,000 to $8,000. The court, holding that he must have known the first statement, when he made it, to be grossly and inexcusably false; and that it could not be reasonably doubted that it was falsely made for the purpose of inducing R. & Co. to sell him goods on credit; and that they gave him the credit on the faith of the statement; upheld the affidavit and sustained the attachment.[1]

In Minnesota, under a statute authorizing attachment when "the plaintiff's debt was fraudulently contracted," an attachment was sustained on an affidavit that the defendant had embezzled or fraudulently converted to his own use money of the plaintiff.[2] But in Missouri an attachment is allowed "where the debt sued for was fraudulently contracted on the part of the debtor;" and it was there held, that attachment would not lie against one who had sold property of another entrusted to him, and converted the proceeds to his own use; the court saying, "By electing to sue for the money for which the property was sold, the plaintiff affirms the acts of the wrong-doer claiming the proceeds thereof, and is thereafter estopped from treating the transaction as a wrong. He will not be permitted to waive the tort and to prosecute the defendant for it in the same suit."[3] And in Alabama it was held, that the plaintiff will not be permitted to affirm the validity of the sale of certain property by the defendant to the garnishee, in order to subject the garnishee to the payment of the purchase-money therefor, and at the same time attack the sale for fraud.[4]

In Pennsylvania an attachment is authorized on affidavit that "the defendant fraudulently incurred the obligation for which the plaintiff's claim is made." A. and B. each claimed to be the owner of a tract of land. B. entered upon the same, and cut, removed, and sold a large quantity of timber. Thereupon A., claiming the right to waive the tort, brought suit against B. in assumpsit for the value of the timber, and obtained an attach-

[1] Rosenthal *v.* Wehe, 58 Wisconsin, 621. See Warner *v.* Kade, 15 Missouri Appeal, 600; Kahn *v.* Angus, 61 Wisconsin, 264; Littlejohn *v.* Jacobs, 66 Ibid. 600.

[2] Cole *v.* Aune, 40 Minnesota, 80.

[3] Finlay *v.* Bryson, 84 Missouri, 664.

[4] Godden *v.* Pierson, 42 Alabama, 370.

ment, on affidavit that "the defendant had fraudulently incurred the obligation." The court dissolved the attachment, characterizing the proceeding as a remarkably novel one, and deserving full credit for originality, — waiving the tort, or the fraud, in order to sue by attachment, and then immediately shifting the ground and setting up the fraud as the foundation for the attachment proceeding.[1]

In Colorado, the statute authorizes an attachment where the defendant "fraudulently contracted the debt or incurred the liability respecting which the suit is brought." Suit was brought by attachment against a clerk of a county treasurer, who, as clerk, lawfully received moneys due to the county, and fraudulently converted the same to his own use; the treasurer being liable therefor to the county on his official bond. The attachment was quashed on motion, on the ground that there was no such privity between the clerk and the county, as to create an implied contract between them; the bond of the treasurer being the express contract covering his duties and those of the employees in his office.[2]

§ 77 *d*. The statutory language in reference to cases of the class now under consideration is nearly uniformly that the defendant "fraudulently contracted the debt or incurred the obligation." In some States, there are added the words, "for which suit is about to be or has been brought;" in others, the words, "respecting which the action is brought." Under a statute containing the former terms, it was held, in Nebraska, that false representations made by one indebted for goods sold, by which the creditor was induced to grant an extension of time, and to take the debtor's note for the debt, payable at a future day, did not justify an attachment *on the note* on the ground that the debt was fraudulently contracted; for the note was not a new debt, but the same that had been contracted *before* any false representations were made; and that fraud, to sustain an attachment, must have existed *at or before the time of the original contracting.*[3] But this view seems too restricted, for it overlooks the fact that though the debt is the same notwithstanding the giving of the note, yet, by inducing the creditor to give an extension of time, and to accept new notes, a new *obligation* in regard to the debt was incurred through the debtor's false representations, which

[1] Walker *v.* Beury, 7 Penn. County Court, 258.

[2] Goss *v.* Board of Commissioners, 4 Colorado, 468.

[3] Mayer *v.* Zingre, 18 Nebraska, 458.

brought the case within the purview of the statute; as was held by the Supreme Court of Wisconsin, under a statute using the second form of words above given.[1]

§ 77 *e*. As applicable in common to all the topics presented in this chapter, there are propositions with which it may be fitly closed. Where several persons are jointly and severally liable for the same debt, the creditor may proceed by attachment against them all, if there exist a ground or grounds of attachment against all, or he may so proceed against any one or more of them, in regard to whom any ground of attachment may exist.[2] If the attachment be against all, it may be levied on the separate property of each, as well as on the joint property of all.[3] If it be against a part of them, it can be levied only on the property of the one or more against whom it was issued.[4] If it be for a partnership debt, and be issued against a part only of the members of the firm, it cannot be levied on the partnership property.[5] To reach that, there must be grounds of attachment against all the members of the firm.[6]

[1] Wachter *v.* Famachon, 62 Wisconsin, 117; First Nat. B'k *v.* Rosenfeld, 66 Wisconsin, 292.

[2] Matter of Chipman, 14 Johnson, 217; Matter of Smith, 16 Ibid. 102; Chittenden *v.* Hobbs, 9 Iowa, 417; Austin *v.* Burgett, 10 Ibid. 302; Green *v.* Pyne, 1 Alabama, 235; Conklin *v.* Harris, 5 Ibid. 213.

[3] Hadley *v.* Bryars, 58 Alabama, 139.

[4] Matter of Smith, 16 Johnson, 102; Whitfield *v.* Hovey, 30 South Carolina, 117.

[5] Matter of Smith, *ut supra*; Whitfield *v.* Hovey, *ut supra*; Bogart *v.* Dart, 32 New York Supreme Ct. 395; Hamilton *v.* Knight, 1 Blackford, 25; Wiley *v.* Sledge, 8 Georgia, 532.

[6] Collier *v.* Hanna, 71 Maryland, 253.

CHAPTER IV.

LIABILITY OF CORPORATIONS AND REPRESENTATIVE PERSONS TO BE SUED BY ATTACHMENT.

§ 78. We have seen that *debtors* are liable to be sued by attachment. This might be supposed to include all descriptions of persons; but we find that doubts have arisen as to the liability of corporations to attachment; and that there are some descriptions of natural persons who are exempt from it.

§ 79. *Corporations.* At an early day it was decided in New York that an attachment did not lie against a foreign corporation.[1] This view, however, has not been followed by any court out of that State, except the Superior Court of Delaware, — not the court of last resort in that State, — by which it was held, that though the word "person," in the attachment law, would embrace an artificial as well as a natural person, yet as the legislature had made no provision by which a foreign corporation could put in special bail, or enter into security to the plaintiff to defend and abide the result of the action, when it appears to the attachment, it must be considered that the law does not contemplate or include the case of a foreign corporation.[2] The contrary doctrine has been announced in New Hampshire, Pennsylvania, Virginia, Georgia, Alabama, Louisiana, Tennessee, Illinois, and Missouri, and may now be considered as settled.[3] In many of the States corporations are expressly subjected by statute to the operation of the process.

§ 80. The foreign character of a corporation is not to be determined by the place where its business is transacted, or

[1] McQueen *v.* Middletown Man. Co., 16 Johnson, 5.

[2] Vogle *v.* New Grenada Canal Co., 1 Houston, 294.

[3] Libbey *v.* Hodgdon, 9 New Hamp. 394; Bushel *v.* Commonwealth Ins. Co., 15 Sergeant & Rawle, 173; U. S. Bank *v.* Merchants' Bank, 1 Robinson (Va.), 573; South Carolina R. R. Co. *v.* McDonald, 5 Georgia, 531; Wilson *v.* Danforth, 47 Ibid. 676; Planters & Merchants Bank *v.* Andrews, 8 Porter, 404; Martin *v.* Branch Bank, 14 Louisiana, 415; Hazard *v.* Agricultural Bank, 11 Robinson (La.), 326; Union Bank *v.* U. S. Bank, 4 Humphreys, 369; Mineral Point R. R. Co. *v.* Keep, 22 Illinois, 9; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Missouri, 421.

where the corporators reside, but by the place where its charter was granted. With reference to inhabitancy, it is considered an inhabitant of the State in which it was incorporated.[1] And where, as is sometimes the case, a corporation is chartered by two or more States, it is a domestic corporation in each of them.[2] And if a corporation created in one State be authorized by the law of another State to exercise therein certain powers, and such law further declare that it shall be there entitled to all the privileges, rights, and immunities conferred upon it by the law of its incorporation; and it is not by the law of the State where it was incorporated liable to be sued by attachment for the mere failure to pay its debts; it is not liable to be sued by attachment as a non-resident of the other State.[3] But where a foreign railroad company was authorized by law to extend its road into the State of Georgia, and was, by that law, made liable to be sued in the courts of that State, it was there held, that this was merely a cumulative remedy for the protection of Georgia people, and did not make the company any the less a foreign corporation, and liable to be proceeded against as such by attachment.[4]

§ 80 *a*. The proposition that a corporation chartered by two or more States is a domestic corporation in each of them, is subject to an exception, where the corporation has never organized or acted under the second charter. In a case of that description, in the State which had granted the second charter, an attachment was sustained against a corporation, under a statute providing

[1] Harley *v.* Charleston Steam-Packet Co., 2 Miles, 249; South Carolina Railroad Co. *v.* McDonald, 5 Georgia, 531; Day *v.* Newark I. R. Man. Co., 1 Blatchford, 628; Mineral Point R. R. Co. *v.* Keep, 22 Illinois, 9. In Cooke *v.* State Nat. Bank, 50 Barbour, 339; 3 Abbott Pract. N. s. 339; 1 Lansing, 494; 52 New York, 96, under a statute which defined a foreign corporation to be one "created by or under the laws of any other State, government, or country," it was held that a national bank organized under the act of Congress, and located in Boston, was a foreign corporation, and liable to be proceeded against by attachment. See, to the same effect, Bowen *v.* First Nat. Bank, 34 Howard Pract. 408; Robinson *v.* Nat. Bank, 81 New York, 385; 58 Howard Pract. 306; 26 New York Supreme Ct. 477.

[2] Sprague *v.* Hartford P. & F. R. R. Co., 5 Rhode Island, 233.

[3] Martin *v.* Mobile & O. R. R. Co., 7 Bush, 116. In New Jersey, there is a statute authorizing attachment to issue "against any corporation or body politic not created or recognized by the laws of this State;" and it was held, that an authority given by a law of that State to a foreign corporation to hold real estate therein for the purpose of transacting its business, was such a recognition as forbade its being proceeded against by attachment. Phillipsburgh Bank *v.* Lackawanna R. R. Co., 3 Dutcher, 206.

[4] South Carolina R. R. Co. *v.* People's Saving Institution, 64 Georgia, 18.

that "a writ of foreign attachment may be issued . . . against any corporation . . . not created by or existing under the laws of this State." [1]

§ 81. *Representative Persons.* In New York, it was held, in a case which arose at an early period, that the statute of that State respecting absent debtors did not warrant proceedings against heirs, executors, trustees, or others claiming merely by right of representation.[2] Subsequently this doctrine was recognized and affirmed, under another statute, which the court said was much more explicit than that which was the subject of the former construction. Under this second statute an attachment might be obtained by a creditor "having a demand against the debtor *personally*." [3] The same views have been expressed in Rhode Island, Connecticut, New Jersey, Pennsylvania, South Carolina, Georgia, Alabama, Louisiana, and the District of Columbia.[4] In Virginia, however, in the proceeding by foreign attachment *in chancery*, the heirs of a deceased debtor may be proceeded against, for the purpose of subjecting the property of their ancestor to the payment of his debt; [5] and a creditor of an absent debtor, who is one of the heirs and distributees of a deceased intestate in Virginia, may go into a court of equity, for the purpose of having a division and distribution of the estate of the decedent, and of procuring payment of his debt out of the share of the absent debtor in the estate.[6]

§ 82. But if an executor or administrator, in the course of the discharge of his duties as such, place himself in a position where he becomes, by the principles of law, personally liable, as, for instance, if he enter upon leasehold property held by his testator or intestate in his lifetime, or receive the rents and profits thereof, he thereby becomes chargeable in the *debet* and *detinet*, or directly on the covenant, as an assignee, and may be proceeded

[1] Philadelphia W. & B. R. R. Co. *v.* Kent Co. R. R. Co., 5 Houston, 127.

[2] Jackson *v.* Walsworth, 1 Johns. Cases, 372; Metcalf *v.* Clark, 41 Barbour, 45.

[3] Matter of Hurd, 9 Wendell, 465.

[4] Bryant *v.* Fussel, 11 Rhode Island, 286; Stanton *v.* Holmes, 4 Day, 87; Peacock *v.* Wildes, 3 Halsted, 179; Haight *v.* Bergh, 3 Green, 183; McCoombe *v.* Dunch, 2 Dallas, 73; Pringle *v.* Black, Ibid. 97; Weyman *v.* Murdock, Harper, 125; Taliaferro *v.* Lane, 23 Alabama, 369; Brown *v.* Richardson, 1 Martin, N. s. 202; Dubuys *v.* Yerbey, Ibid. 380; Cheatham *v.* Carrington, 14 Louisiana Annual, 696; Levy *v.* Succession, 38 Ibid. 9; Patterson *v.* McLaughlin, 1 Cranch, C. C. 352; Henderson *v.* Henderson, Ibid. 469; Smith *v.* Riley, 32 Georgia, 356; Williamson *v.* Beck, 8 Philadelphia, 269.

[5] Carrington *v.* Didier, 8 Grattan, 260.

[6] Moores *v.* White, 3 Grattan, 139.

against personally, and need not be named as executor or administrator. Thus a lessee covenanted that he, his executors, administrators, or assigns would, at his and their own proper costs and charges, pay and discharge all taxes, duties, and assessments which should, during the term, be imposed upon the demised premises; and the lessee died intestate, and letters of administration were granted to a non-resident, who received the rents, issues, and profits of the premises. An assessment was imposed upon the premises in the laying out, opening, and continuing of a street, a portion of which the lessor was obliged to pay; who thereupon instituted proceedings by attachment against the administrator, alleging that he was indebted to him *personally*, and the court sustained the attachment.[1]

[1] Matter of Galloway, 21 Wendell, 32.

CHAPTER V.

AFFIDAVIT FOR OBTAINING AN ATTACHMENT.

§ 83. UNDER no general jurisdiction, legal or equitable, known to any system of unwritten law prevalent in Great Britain, or in any State or Territory of the United States, has any court or officer authority to issue or grant a writ of attachment against a debtor's property. In Great Britain — as shown in the opening chapter of this work — that authority exists only under local custom; in the United States it is purely statutory. In each country it belongs to the class of special and limited powers. Though everywhere here vested, by statute, in courts of general jurisdiction, its essential character is not thereby changed; to whatever description of court or officer its exercise is committed, it is still a special and limited power, resting upon its own peculiar grounds, acting in its own prescribed modes, and leading to its own specific results.

§ 84. In nearly all the States, and in all the Territories, an affidavit alleging certain facts is required, as authority for issuing an attachment. Wherever so, the right to issue it depends upon that requirement being met. There is no more right to issue it without the prescribed affidavit than to issue an execution without a judgment.[1] In some cases, as will presently appear, the validity of all subsequent proceedings, and of titles derived through them, may depend on the conformity of the affidavit to the statute; while, in a much larger class of cases, the attacher may, through defects in that respect, lose the benefit intended to be afforded by the remedy. What relates to the affidavit is, therefore, fundamental; and hence its treatment leads naturally to the statement of some points in the subject of *Jurisdiction*.

[1] This proposition is subject to exception, where, by statute, process is authorized to be issued in favor of a State, "without giving bond or security, or causing affidavit to be made." Such authority is no violation of the constitutional provision which prohibits any person from being deprived of his property "without due process of law." *Ex parte* Macdonald, 76 Alabama, 603.

§ 85. Jurisdiction is the power to hear and determine a cause;[1] or, more fully stated, the power to hear and determine the subject-matter in controversy between parties to a suit, — to adjudicate, or exercise any judicial power over them.[2]

What shall be adjudged or decreed between the parties, is judicial action.[3]

The exercise of jurisdiction is *coram judice* whenever a case is presented which lawfully calls it into action.[4] Of course the converse follows, that the exercise of jurisdiction is *coram non judice* when the case presented does not lawfully call it into action.

Jurisdiction is either general or special.

General jurisdiction is the power to take all ordinary judicial action in any description of cause brought before a court in any common-law mode, or in any mode prescribed by statute in lieu, and as the equivalent, of the common-law mode.

Special jurisdiction — necessarily, also, always limited — is the power derived solely from and exercisable only according to statute, to take such judicial action, through such modes of procedure, as the statute authorizes and prescribes.

A court may be at the same time one of general, and one of special and limited jurisdiction. It may be limited as to subjects, but unlimited as to persons. It may be limited as to persons, but unlimited as to subjects. It may be unlimited as to both subjects and persons, but limited as to the amount for which it may render judgment. It may be unlimited as to subjects, persons, and amount, but limited as to modes of procedure.

Jurisdiction, of either kind, acts through process and modes of procedure; which are either ordinary, that is, such as under the general law are used in all ordinary actions; or extraordinary, that is, such as are provided by statute for exceptional cases, and are available only under particular circumstances designated by statute.

In cases of the exercise of general jurisdiction, the presumption is that it was lawfully exercised, until the contrary be shown by the record.[5] And where new powers are, by statute, con-

[1] United States *v.* Arredondo, 6 Peters, 691.

[2] Rhode Island *v.* Massachusetts, 12 Peters, 657; Grignon *v.* Astor, 2 Howard Sup. Ct. 319.

[3] Rhode Island *v.* Massachusetts; Grignon *v.* Astor, *ut supra.*

[4] United States *v.* Arredondo, *ut supra.*

[5] Voorhees *v.* Bank U. S., 10 Peters, 449; Grignon *v.* Astor, 2 Howard Sup. Ct. 319; Harvey *v.* Tyler, 2 Wallace, 328; Davis *v.* Connelly, 4 B. Monroe, 136; Bimeler *v.* Dawson, 5 Illinois (4 Scammon), 536; Shumway *v.* Stillman, 4 Cowen, 292; Bloom *v.* Burdick, 1 Hill (N. Y.), 130; Horner *v.* Doe, 1 Indiana,

ferred upon a court of general jurisdiction, to be exercised in the usual form of common-law or chancery proceedings, the same presumption will be made as in cases falling more strictly within its usual powers.[1]

But where a court or officer exercises an extraordinary power, under a special statute prescribing the occasion and mode of its exercise, no such presumption arises: on the contrary, the proceedings of such court or officer will be held illegal unless they be according to the statute, and the facts conferring jurisdiction appear affirmatively.[2]

When the proceedings of a court which, by its constitution, has only special and limited jurisdiction, are relied on as supporting any right, all the facts requisite to confer upon it the jurisdiction it exercised must be averred and proved;[3] they cannot be presumed.[4]

130; Cox *v.* Thomas, 9 Grattan, 323; Sears *v.* Terry, 26 Conn. 273. In Grignon *v.* Astor, *ut supra*, the Supreme Court of the United States said: "The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent, by its constitution, to decide on its own jurisdiction, and to exercise it to final judgment, without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment, save by the appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description: every requisite for either must appear on the face of their proceedings, or they are nullities."

[1] Harvey *v.* Tyler, 2 Wallace, 328.

[2] Thatcher *v.* Powell, 6 Wheaton, 119; Walker *v.* Turner, 9 Ibid. 541; Harvey *v.* Tyler, 2 Wallace, 328; Granite Bank *v.* Treat, 18 Maine, 340; Morse *v.* Presby, 5 Foster, 299; Hall *v.* Howd, 10 Conn. 514; Brooks *v.* Adams, 11 Pick. 441; Jones *v.* Reed, 1 Johns. Cases, 20; Cleveland *v.* Rogers, 6 Wendell, 438; Dakin *v.* Hudson, 6 Cowen, 221; Mills *v.* Martin, 19 Johns. 7; People *v.* Koeber, 7 Hill (N. Y.), 39; Corwin *v.* Merritt, 3 Barbour, 341; Harrington *v.* People, 6 Ibid. 607; Camp *v.* Wood, 10 Watts, 118; Boarman *v.* Patterson, 1 Gill, 372; Harshaw *v.* Taylor, 3 Jones, 513; Tift *v.* Griffin, 5 Georgia, 185; Commissioners *v.* Thompson, 18 Alabama, 694; Owen *v.* Jordan, 27 Ibid. 608; Reeves *v.* Clark, 5 Arkansas, 27; State *v.* Metzger, 26 Missouri, 65; Rowan *v.* Lamb, 4 G. Greene, 468; Wight *v.* Warner, 1 Douglass, 384; Bryan *v.* Smith, 10 Michigan, 229; Supervisors *v.* Le Clerc, 4 Chandler, 56; Coward *v.* Dillinger, 56 Maryland, 59; West *v.* Woolfolk, 21 Florida, 189.

[3] Sears *v.* Terry, 26 Conn. 273; Frary *v.* Dakin, 7 Johns. 75; Morgan *v.* Dyer, 10 Ibid. 161; Mills *v.* Martin, 19 Ibid. 7; Wyman *v.* Mitchell, 1 Cowen, 316; Dakin *v.* Hudson, 6 Ibid. 221; Otis *v.* Hitchcock, 6 Wendell, 433; Stephens *v.* Ely, 6 Hill (N. Y.), 607; Ford *v.* Babcock, 1 Denio, 158.

[4] Green *v.* Haskell, 24 Maine, 180; Bridge *v.* Ford, 4 Mass. 641; Hall *v.* Howd, 10 Conn. 514; Snediker *v.* Quick, 1 Green, 306; State *v.* Shreeve, 3 Green, 57; Bridge *v.* Bracken, 3 Chandler, 75; Wight *v.* Warner, 1 Douglass, 384; Chandler *v.* Nash, 5 Michigan, 409; Firebaugh *v.* Hall, 63 Illinois, 81.

When a court of general jurisdiction is invested, by statute, with special powers, to be exercised, not through its ordinary process and modes of procedure, but in an extraordinary mode prescribed by statute, neither the jurisdiction nor the remedy is to be extended beyond the legislative grant;[1] but the proceedings of the court must be regarded as those of a court constituted with special and limited jurisdiction, and will be held invalid if the facts conferring jurisdiction do not appear.[2]

The propositions thus briefly stated will be seen to bear on attachment proceedings.

§ 86. Any movement by a court is an exercise of jurisdiction.[3] In attachment proceedings the issue of the writ of attachment is such a movement;[4] and where the right to exercise jurisdiction in that mode depends upon the exhibition, by affidavit, of certain facts, it is the affidavit which brings the power of the court into action. If there be no affidavit, the whole attachment proceeding is incurably void.[5]

§ 87. Hence, in an attachment suit, under any system requiring an affidavit, it is always the defendant's right, and may become that of others, to question the exercise of jurisdiction in the particular case through attachment, because of the want of legal foundation therefor.

In this connection, therefore, importance attaches to the point whether the defendant was personally served with process in the action. If he was, or if he appear to the action without service, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to such demand as may be established against him by the final judgment of the court.[6] In such case,

[1] Pringle *v.* Carter, 1 Hill (S. C.), 53; Vann *v.* Adams, 71 Alabama, 475.

[2] Williamson *v.* Berry, 8 Howard Sup. Ct. 495; Boswell *v.* Otis, 9 Ibid. 336; Ransom *v.* Williams, 2 Wallace, 313; Morse *v.* Presby, 5 Foster, 299; Eaton *v.* Badger, 33 New Hamp. 228, Denning *v.* Corwin, 11 Wendell, 647; Striker *v.* Kelly, 7 Hill (N. Y.), 9; Embury *v.* Conor, 3 Comstock, 511; Gray *v.* McNeal, 12 Georgia, 424; Foster *v.* Glazener, 27 Alabama, 391; Haywood *v.* Collins, 60 Illinois, 328; Firebaugh *v.* Hall, 63 Ibid. 81; Cooper *v.* Sunderland, 3 Iowa, 114; Christie *v* Unwin, 11 Adolphus & Ellis, 373; Muskett *v.* Drummond, 10 Barnewall & Cresswell, 153.

[3] Rhode Island *v.* Massachusetts, 12 Peters, 657; Grignon *v.* Astor, 2 Howard Sup. Ct. 319.

[4] *Non potest quis sine brevi agere.* Fleta, l. 2, c. 13, § 4 *Nemo sine actione experitur, et hoc non sine brevi sive libello conventionali.* Bracton, 112.

[5] Inman *v.* Allport, 65 Illinois, 540; Endel *v.* Leibrock, 33 Ohio State, 254.

[6] Cooper *v.* Reynolds, 10 Wallace, 308.

if he make no question of the right of the court to exercise jurisdiction over him by attachment, the proceedings, however defective the affidavit, will be valid; and the rights acquired through them will not depend on the attachment for their validity, but upon the judgment; which, in such case, cannot be impeached in any collateral proceeding.[1]

When, therefore, the defendant appears to the action, and in any authorized way assails the attachment on account of absence of, or insufficiency in, the affidavit, his motion or plea is based, not upon mere irregularity in the proceedings, but upon the want of proper foundation for the exercise of jurisdiction over him in that particular mode. If his motion or plea be sustained, the writ, and all proceedings under it, are *coram non judice* and void,[2] unless the defect be amendable, and be amended; and no such amendment can be made, unless authorized by law expressly applicable to such cases.[3]

§ 87 *a*. The matter for present consideration, however, is not the defendant's proceedings to defeat the attachment; but whether, and to what extent, attachment proceedings may be assailed collaterally for infirmity in the affidavit, when title is claimed through them. If vulnerable at all in this respect when so assailed, it must be because the affidavit was not lawfully sufficient to support jurisdiction by attachment; for no doctrine is better settled than that mere errors and irregularities in judicial action cannot be questioned collaterally, but must be corrected by some direct proceeding for that purpose, either before the same court, to set them aside, or in an appellate court.[4]

But it is equally well settled that the jurisdiction of any court, exercised in any case, may be assailed in other courts, in which

[1] Toland *v.* Sprague, 12 Peters, 300.

[2] Smith *v.* Luce, 14 Wendell, 237; *Ex parte* Haynes, 18 Ibid. 611; *Ex parte* Robinson, 21 Ibid. 672; *In re* Faulkner, 4 Hill (N. Y.), 598; *In re* Bliss, 7 Ibid. 187; Mantz *v.* Hendley, 2 Hening & Munford, 308; McReynolds *v.* Neal, 8 Humphreys, 12; Maples *v.* Tunis, 11 Ibid. 108; Wight *v.* Warner, 1 Douglass, 384; Buckley *v.* Lowrey, 2 Michigan, 418; Clark *v.* Roberts, 1 Illinois (Breese), 222; Cadwell *v.* Colgate, 7 Barbour, 253; Bruce *v.* Cook, 6 Gill & Johnson, 345; Kennedy *v.* Dillon, 1 A. K. Marshall, 354; McCulloch *v.* Foster, 4 Yerger, 162; Conrad *v.* McGee, 9 Ibid. 428; Whitney *v.* Brunette, 15 Wisconsin, 61.

[3] Brown *v.* McCluskey, 26 Georgia, 577; Cohen *v* Manco, 28 Ibid. 27; Slaughter *v.* Bevans, 1 Pinney, 348; Halley *v.* Jackson, 48 Maryland, 254; Marx *v.* Abramson, 53 Texas, 264; Bennett *v.* Zabriski, 2 New Mexico, 7, 176.

[4] Kempe's Lessee *v.* Kennedy, 5 Cranch, 173; Thompson *v* Tolmie, 2 Peters, 157; Voorhees *v.* Bank U. S., 10 Ibid. 449, Harvey *v.* Tyler, 2 Wallace, 328; McGavock *v* Bell, 3 Coldwell, 512; Gibbons *v.* Bressler, 61 Illinois, 110; Kruse *v.* Wilson, 79 Ibid. 233; Gilkeson *v.* Knight, 71 Missouri, 403.

its proceedings are relied on by a party claiming the benefit of *them*;[1] and if there be found in them a total want of jurisdiction, they may, by the court in which they are questioned, be rejected as a nullity, conferring no right and affording no justification.[2]

And no court exercising a special and limited power can so determine its right to take jurisdiction through that power in a given case, as to preclude one not a party to the proceedings from questioning that right in a collateral inquiry; for, as the validity and conclusiveness of the decision on that point must depend on the authority of the court to make it, the decision cannot be conclusive evidence of that authority. This would be saying that the court had jurisdiction to decide, because it had decided that it had jurisdiction.[3]

§ 87 *b*. It is where attachment proceedings are purely *ex parte* — the defendant not being personally served with process, and not appearing to the action — that the collateral impeachment of the attachment for jurisdictional defect may be to him, or to persons claiming under him, a matter of signal importance. There the proceeding is simply one to take, by process of law, one man's property, and, without his assent or knowledge, give it to another: a severe recourse, in derogation of the common law; in regard to which nothing in favor of jurisdiction is to be presumed, and which the law demands shall be pursued in conformity with the statute under which it is taken, or no title will pass through its instrumentality.[4]

[1] Elliott *v.* Peirsol, 1 Peters, 328; Shriver *v.* Lynn, 2 Howard Sup. Ct. 43; Russell *v.* Perry, 14 New Hamp. 152; Hall *v.* Williams, 6 Pick. 232; Aldrich *v.* Kinney, 4 Conn. 380; Borden *v.* Fitch, 15 Johns. 121; Starbuck *v.* Murray, 5 Wendell, 148; Shumway *v.* Stillman, 4 Cowen, 292; Noyes *v.* Butler, 6 Barbour, 613; Chemung Bank *v.* Judson, 4 Selden, 254 Holt *v.* Alloway, 2 Blackford, 108; Earthman *v.* Jones, 2 Yerger, 484 Rogers *v.* Coleman, Hardin, 413; Davis *v.* Connelly, 4 B. Monroe, 136.

[2] Thompson *v.* Tolmie, 2 Peters, 157; Voorhees *v.* Bank U. S., 10 Ibid. 449. For cases in which it has been held that judgment against a garnishee will not protect him, where the court has no jurisdiction of the defendant, see *post*, § 696.

[3] Broadhead *v.* McConnell, 3 Barbour, 175; Wheeler *v.* Townsend, 3 Wendell, 247; Sears *v.* Terry, 26 Conn. 273.

[4] Thatcher *v.* Powell, 6 Wheaton, 119; Ronkendorff *v.* Taylor, 4 Peters, 349; Parker *v.* Overman, 18 Howard Sup. Ct. 137; Ransom *v.* Williams, 2 Wallace, 313; Denning *v.* Smith, 3 Johns. Ch'y, 332; Jackson *v.* Shepard, 7 Cowen, 88; Atkins *v.* Kinnan, 20 Wendell, 241; Bloom *v.* Burdick, 1 Hill (N. Y.), 130; Sharp *v.* Speir, 4 Ibid. 76; Sherwood *v.* Reade, 7 Ibid. 434; Corwin *v.* Merritt, 3 Barbour, 341; Harrington *v.* People, 6 Ibid. 607; Kelso *v.* Blackburn, 3 Leigh, 299; Barksdale *v.* Hendree, 2 Patton, Jr., & Heath, 43.

§ 87 *c*. As will appear in a succeeding portion of this chapter,[1] an attachment issues in some States as a matter of right, upon affidavit being made that certain facts exist; while in others it is required that the officer shall be satisfied, by affidavit presented to him, of the existence of the facts. In the former case the officer's duty is merely ministerial, involving no inquiry on his part, except as to whether particular facts are sworn to; in the latter, his functions are judicial, as well as ministerial; he must be satisfied judicially, by the affidavit, not merely that the facts are sworn to, but that the evidence is sufficient to prove that they really exist. It will be noticed that the cases about to be cited, in which attachments have been successfully assailed collaterally on account of insufficient affidavit, have arisen under each of those systems.

§ 88. The cases in which *ex parte* attachment proceedings have been successfully assailed collaterally, for insufficiency in the affidavit to sustain jurisdiction, were those in which title to property was claimed through those proceedings. Such have arisen in New York, where the officer issuing the attachment acts judicially in determining whether the facts stated in the affidavit establish the ground of attachment; and in Tennessee and Missouri, where the writ issues upon affidavit simply of the existence of certain facts. In all those States the question arose in actions of ejectment. In New York, the plaintiff claimed title as a purchaser at a sale made by trustees, appointed under the law of that State, in a proceeding by attachment; the trustees being there empowered to sell the property attached. The title thus set up was assailed for want of jurisdiction in the officer who issued the attachment, because of the defective character of the affidavits, in not laying a sufficient ground for its issue. The court went into an examination of the affidavits, and declared them insufficient, and held that the attachment was void; that the subsequent proceedings fell with it; and that the sale by the trustees conferred no title on the purchaser. "There was," said the court, "conferred upon the judge who issued the attachment a special and limited jurisdiction. It is well settled that when certain facts are to be proved to a court having only such a jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to *any* essential fact, the process will be declared void, in whatever form the question may arise. But when the proof has a legal tendency to make out a proper case, in all its

[1] *Post*, §§ 97–100.

parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose. In one case, the court acts without authority; in the other, it only errs in judgment upon a question properly before it for adjudication. In one case, there is a defect of jurisdiction; in the other, there is only an error of judgment. Want of jurisdiction makes the act void; but a mistake concerning the just weight of evidence only makes the act erroneous, and it will stand good until reversed." [1]

The cases in Tennessee are of the same character. In one of them the court said: "It appears from the record of these proceedings, that the affidavit was defective, in not stating the cause for which the attachment issued, whilst the attachment is good in point of form, and assumes, in effect, that a perfect affidavit was made. It is now insisted that the writ of attachment shall be conclusive as to all the material facts it assumes, and that it can neither be aided nor impaired by reference to the affidavit required in such cases; that the affidavit is not required to be recorded with the other proceedings in the Circuit Court, and that therefore we can take no judicial notice of it. It will be observed, however, by reference to the act just referred to, that it is required that the affidavit be made part of such record. We think it a reasonable and proper rule that the validity of this description of judicial sales shall be tested by the record of the Circuit Court, made in pursuance of the statute. It was intended by the statute that such record should be the proper and permanent memorial of the validity of the sale. The affidavit forms a material part of the record, and we think we are not precluded by the writ of attachment from taking judicial notice of it. . . . The affidavit was materially defective, and was not amended. The consequence is, that the judgment and execution on the attachment were void, and the sale communicated no title to the purchaser." [2]

In Missouri, the statute requires the plaintiff, before an attachment can issue, to file an affidavit, stating that he has a just demand against the defendant, and the amount thereof which the affiant believes the plaintiff ought to recover, after allowing all just credits and set-offs, and that he has good reason to

[1] Staples *v.* Fairchild, 3 Comstock, 41; Miller *v.* Brinkerhoff, 4 Denio, 118.

[2] Maples *v.* Tunis, 11 Humphreys, 108; Conrad *v.* McGee, 9 Yerger, 428; Stewart *v.* Mitchell, 10 Heiskell, 488; Rumbough *v.* White, 11 Ibid. 260. See Wilson *v.* Arnold, 5 Michigan, 98, where a title derived through *ex parte* attachment proceedings was held invalid, because the affidavit was made several days before the attachment issued.

believe, and does believe, the existence of one or more of the causes which according to the provisions of the statute, would entitle the plaintiff to sue by attachment. There an attachment was issued upon an affidavit which entirely omitted any statement about the plaintiff's demand, such as the law required, and merely stated that to the best of affiant's knowledge and belief the defendants were non-residents of the State. The attachment was levied on real estate, and the suit was prosecuted *ex parte* to judgment, the defendant being notified by publication. Under execution the land was sold, and the validity of the title thereby acquired was the point in controversy; the decision of which turned on the question whether the court had ever acquired jurisdiction of the attachment proceeding. The court held, that the affidavit was no foundation for the exercise of jurisdiction, and that no title passed under the sale.[1] And in a similar case in the same State, a like result was reached, where the paper described and referred to by the clerk as the one upon which the writ of attachment issued, was not signed by either the affiant or the clerk; and was therefore held to be no affidavit.[2] But the Missouri court, after twice holding the position stated in this section, overruled it, on the ground that by the Missouri statute an affidavit for attachment may be amended; that there was enough in the affidavit in question to amend by; and that judicial proceedings which are amendable cannot in a collateral proceeding be declared void.[3]

§ 88 *a*. Another instance of the successful assailing collaterally of an attachment proceeding arose in Mississippi, under a judgment rendered against a garnishee, in an attachment suit where the defendant was not served, but judgment against him was taken by default, on proof of publication. In such a case the statute required a bond to be given by the plaintiff, before any sale should be made, or execution issued against any garnishee, conditioned that if the defendant should appear within a year and a day, and disprove the debt, then the plaintiff should restore the money received toward the satisfaction of his demand, or so much thereof as should be disproved or avoided; and any sale made without such bond being given should be utterly void. Execution was issued upon the judgment against the garnishee without such a bond having been given, and under it land of the

[1] Bray *v.* McClury, 55 Missouri, 128; Burnett *v.* McCluey, 78 Ibid. 676.

[2] Hargadine *v.* Van Horn, 72 Missouri, 370; Third Nat. Bank *v.* Garton, 40 Missouri Appeal, 113.

[3] Burnett *v.* McCluey, 92 Missouri, 230.

garnishee was sold; and it was held, that owing to the plaintiff's failure to give the bond, the execution and the sale thereunder were wholly void.[1]

§ 89. From what has been presented in the preceding sections of this chapter, the following propositions in regard to *ex parte* attachment proceedings, under any system requiring an affidavit as the ground for issuing the writ, may be considered established:

1. The issue of a writ of attachment is a movement in the exercise of jurisdiction.

2. There is no lawful right to make that movement, unless such ground be laid therefor, by affidavit, as the law prescribes.

3. If there be no affidavit, or if there be one, but with a total absence therefrom of statement of any fact prescribed by law as essential to the issue of the writ, then, in either such case, the writ is *coram non judice* and void.

4. If, however, the affidavit have a legal tendency to make out a case, in all its parts, for issuing the writ, then the jurisdiction will be sustained, though the affidavit be defective, until the proceedings are set aside in some direct resort for that purpose.

5. The proceedings in *ex parte* cases under a void attachment may, in a collateral inquiry, be rejected as a nullity by any court in which rights are asserted under them.

§ 89 *a*. These propositions hinge upon the issue of the writ as the first movement in the exercise of jurisdiction. If lawfully issued, and if property of the defendant be attached under it, then the foundation for further judicial action is laid. But, if unlawfully issued, nothing done under it in *ex parte* cases can claim validity. For, as no jurisdiction *in personam* exists as to the defendant, whether the court can lawfully act at all depends upon its right to exercise jurisdiction *in rem*. If there be neither person nor thing for its jurisdiction to act upon, the whole proceeding necessarily falls.[2] Every such suit, therefore, proceeds to final judgment upon the assumption that, through the operation of the writ, the defendant's property has been *lawfully* subjected to the power of the court. But if it was attached under a writ unlawfully issued, it has not, in contemplation of law, been at all subjected to that power, and no dominion which the court may, through the forms and agencies of the law, exercise

[1] Hiller *v.* Lamkin, 54 Mississippi, 14.

[2] *Ante*, § 5; *post*, § 449.

over it, can devest the defendant's title to it; for it is a dominion without jurisdictional right.

If these views be not correct, then it would seem that all collateral inquiry into the legality and validity of *ex parte* attachment proceedings can be precluded by the mere production of a writ, no matter how unlawfully issued, with a return thereon of property attached; thus making the writ and return incontrovertible evidence of their own legality. Should this ever become settled law, of course the rule *caveat emptor*, universally and immemorially applied to purchasers at judicial sales,[1] would be inapplicable to this class of cases.[2]

§ 89 *b*. But it is only in regard to jurisdiction that the judicial action of any court may be collaterally impugned. As we

[1] The Monte Allegre, 9 Wheaton, 616; Smith *v.* Painter, 5 Sergeant and Rawle, 223; Yates *v.* Bond, 2 Nott & McCord, 382; Murphy *v.* Higginbottom, 2 Hill (S. C.), 397; McWhorter *v.* Beavers, 8 Georgia, 300; O'Neal *v.* Wilson, 21 Alabama, 288; Lang *v.* Waring, 25 Ibid. 625; Vattier *v.* Lytle, 6 Ohio, 477; Creps *v.* Baird, 3 Ohio State, 277; Rodgers *v.* Smith, 2 Indiana, 526; Boggs *v.* Hargrave, 16 California, 559; Arendale *v.* Morgan, 5 Sneed, 703.

[2] In Voorhees *v.* Bank U. S., 10 Peters, 449, the Supreme Court of the United States said: "Some sanctity should be given to judicial proceedings; some time limited, beyond which they should not be questioned; some protection afforded to those who purchase at sales by judicial process; and some definite rules established, by which property thus acquired may be transmissible, with security to the possessors." Undoubtedly sound as general propositions; but, on the other hand, sanctity is not attributable to judicial proceedings devoid of jurisdictional right; nor is protection — save by statutory limitation, based on adverse possession — due to a purchaser at a sale in pursuance of a judgment which the court had no authority to render. More especially should no man's property be taken from him and given to another, unless by lawful authority lawfully pursued; and the duty of guarding an absent one against the unlawful seizure and transfer o his property, without his knowledge, is more sacred, and more consonant with the maxims of law and the dictates of justice, than that of shielding a volunteer purchaser at a judicial sale; upon whom, in law, is the obligation to see that the proceedings through which he seeks to acquire a title rest on a sure foundation of jurisdiction. In Wilson *v.* Arnold, 5 Michigan, 98, the Court said: "When the want of jurisdiction appears on the record of a court of general jurisdiction, the record is a nullity, and no rights can be acquired under it. To hold otherwise would be giving to courts a right, by the form of law only, to take property from an individual against his consent, and give it to another, by an *ex parte* proceeding not authorized by law. If it be said, It is necessary to protect innocent purchasers, we reply, When one of two innocent persons must suffer, he who is most in fault must be the victim. Now, who is most in fault, — the defendant in the attachment suit, who knows nothing of the proceedings against him, or he who purchases property under such proceedings, without looking into them to see whether they are authorized by law? It is a well-settled principle, that one who purchases property without looking into the title-deed of his grantor is, by his own negligence, chargeable with notice of any defect in the title appearing on the face of the deed."

have seen, it cannot be on account of mere errors and irregularities.[1] When jurisdiction appears, the maxim *omnia præsumuntur rite esse acta* applies in favor of the proceedings of every court, whether superior or inferior, or of general or limited jurisdiction.[2]

In such case the title acquired through the attachment will be sustained, though it should afterwards be shown that the allegations in the affidavit upon which the writ issued were false. Thus, in New Jersey, a bill in equity was dismissed, which sought to set aside a sale of real estate under attachment proceedings, on the ground that the defendant, who had been sued as a non-resident, was, in fact, when the attachment issued, a resident. The court held, that in the attachment suit the foundation of the proceedings and of jurisdiction was, not the non-residence of the defendant, but the *plaintiff's affidavit* of that fact; and that the proceedings could not be collaterally assailed as void, by showing the falsity of the affidavit; though if its falsity had, while the action was pending, been therein shown, the writ would have been quashed.[3]

§ 90. If in the proceedings of a court exercising a special and limited jurisdiction the facts which authorize its exercise ought to appear, how must they appear? Manifestly, by the record. Whatever, in such case, is requisite to show that the action of a court is *coram judice*, must necessarily be a part of the record in the case in which the jurisdiction is exercised. Hence, wherever in attachment cases the point has been presented, it has been ruled that the affidavit is part of the record.[4] If no affidavit appears, it was held, in Indiana, that no evidence — save, perhaps, in the case of loss or destruction — is admissible to prove that one was made: even a recital in the writ to that effect

[1] *Ante*, § 87 *a*.

[2] Cooper *v.* Sunderland, 3 Iowa, 114; Morrow *v.* Weed, 4 Ibid. 77; Little *v.* Sinnett, 7 Ibid. 324; State *v.* Berry, 12 Ibid. 58; Rowan *v.* Lamb, 4 G. Greene, 468; Commissioners *v.* Thompson, 18 Alabama, 694; Sheldon *v.* Newton, 3 Ohio State, 494; Reeves *v.* Townsend, 2 Zabriskie, 396; Paul *v.* Hussey, 35 Maine, 97; State *v.* Hinchman, 27 Penn. State, 479; Fowler *v.* Jenkins, 28 Ibid. 176; Wall *v.* Wall, 28 Mississippi, 409; Cason *v.* Cason, 31 Ibid. 578; Fox *v.* Hoyt, 12 Conn. 491; Raymond *v.* Bell, 18 Ibid. 81; Wight *v.* Warner, 1 Douglass, 384; Wells *v.* Stevens, 2 Gray, 115; Harrington *v.* People, 6 Barbour, 607; Morse *v.* Presby, 5 Foster, 299.

[3] Weber *v.* Weitling, 3 New Jersey Eq. 441. See Foster *v.* Higginbotham, 49 Georgia, 263; Dow *v.* Smith, 8 Ibid. 551; Dwyer *v.* Testard, 65 Texas, 432.

[4] Staples *v.* Fairchild, 3 Comstock, 141; Shivers *v.* Wilson, 5 Harris & Johnson, 130; Ford *v.* Woodward, 2 Smedes & Marshall, 260; Maples *v.* Tunis, 11 Humphreys, 108; Conrad *v.* McGee, 9 Yerger, 428; Watt *v.* Carnes, 4 Heiskell, 532; Goss *v.* Board of Com'rs, 4 Colorado, 468.

will not prove the fact, nor sustain the proceeding.[1] On the other hand, in the United States Circuit Court for Ohio, in a case where an attachment proceeding was assailed collaterally, because the record showed no affidavit, the court said, it could not presume there was no affidavit, because none was copied into the record; for in making up the record the clerk might have omitted the affidavit, supposing it not to be part thereof.[2] And in Missouri, where the court could not learn from the record whether there was, in fact, an affidavit; and neither party showed, or offered to show, that an affidavit was or was not made; and the attachment was issued out of a court of general jurisdiction; it was held, that its judgment could not be questioned in a collateral proceeding.[3]

If there be an affidavit, but not filed, the fact that it was delivered to the officer before the writ issued, and was the ground of its issue, but that he failed at the time to file it, may be proved by him, so as to authorize it to be filed *nunc pro tunc.*[4]

§ 90 *a*. The requirement of an affidavit to be filed in the clerk's office, before an attachment can issue, is sufficiently met by the filing of a petition, sworn to, and containing the allegations required to be made in an affidavit. The petition supplies the place of, and dispenses with, a separate affidavit.[5]

§ 90 *b*. Where the affidavit is made on the same day that the writ issues, and speaks of being annexed to the writ, the fact that its language implies that it was made after the writ is no ground for impeaching its validity. Where two acts are done at the same time, that shall be considered to take effect first which ought in strictness to have been done first in order to give it effect.[6]

§ 90 *c*. The omission of the statement of a venue in connection with the affidavit does not vitiate it; the venue being, in fact, no part of the affidavit, but merely intended to show, by an inspection of the instrument, whether it was made within the jurisdiction of the officer who administered the oath.[7]

[1] Bond *v.* Patterson, 1 Blackford, 34.
[2] Biggs *v.* Blue, 5 McLean, 148.
[3] Sloan *v.* Mitchell, 84 Missouri, 546.
[4] Simpson *v.* Minor, 1 Blackford, 229. See Brash *v.* Wielarsky, 36 Howard Pract. 253.
[5] Scott *v.* Doneghy, 17 B. Monroe, 321; Shaffer *v.* Sundwall, 33 Iowa, 579; Miller *v.* Chandler, 29 Louisiana Annual, 88; Watts *v.* Harding, 5 Texas, 386.
[6] Hubbardston L. Co. *v.* Covert, 35 Michigan, 254.
[7] Struthers *v.* McDowell, 5 Nebraska, 491.

§ 90 *d*. It is not necessary that the affidavit be made before the officer by whom the writ is issued; it may be made before any officer authorized to administer oaths.[1]

§ 91. In practice, the first point to be ascertained is, whether, in fact, an affidavit was made. There may be in the record what was designed for, and yet may not be, an affidavit, because not properly authenticated. The absence of the party's signature does not prove that he was not sworn, for it is not necessary to constitute an affidavit, unless required by statute, that the party making should sign it.[2] It is otherwise, however, where there is no official authentication; though, under some circumstances, that has been supplied by implication from the contents of the record, and even by parol proof. Thus, where that appeared among the papers, which wanted only the signature of the judge to the *jurat* to make it a complete affidavit; and across the face of the document were written the words "sworn and subscribed before me," in the handwriting of the judge, but not signed by him; and immediately below, and on the same paper, was written the order for the attachment to issue, which was signed by him; and both the unfinished *jurat* and the order bore the same date; and the order recited that the judge had read the petition, affidavit, and the documents annexed; it was held, that he acted on the paper as an affidavit sworn to before himself; that in signing the order containing that expression, he, by the strongest implication, certified that it had been sworn to before himself; and that the want of his signature to the *jurat* was no sufficient ground for dissolving the attachment.[3] So, where the affidavit was sworn to before the clerk of the court who signed the *jurat*, adding to his name only the word *clerk*, and did not affix the seal of the court; it was considered that the affidavit, though irregular, was not so defective as to make the attachment void.[4] So, where the affidavit was stated in the *jurat* to have been sworn to before one who signed his name, without adding thereto any official designation, but the writ was signed by a person in the same name, as clerk of the court in which the suit was brought; the court presumed that the affidavit

[1] Wright *v.* Smith, 66 Alabama, 545.

[2] Redus *v.* Wofford, 4 Smedes & Marshall, 579; Bates *v.* Robinson, 8 Iowa, 310. *Sed contra*, Cohen *v.* Manco 28 Georgia, 27.

[3] English *v.* Wall, 12 Robinson (La.), 132. See White *v.* Casey, 25 Texas, 552; Farmers' Bank *v.* Gettinger, 4 West Virginia, 305; Cook *v.* Jenkins, 30 Iowa, 452; Kruse *v.* Wilson, 79 Illinois, 233.

[4] Simon *v.* Stetter, 25 Kansas, 155; Cartwright *v.* Chabert, 3 Texas, 261; May *v.* Ferrill, 22 Ibid. 340; Whittenberg *v.* Lloyd, 49 Ibid. 633.

was sworn to before the same officer.[1] But where the papers do not justify such an implication, the absence of an official attestation to the affidavit has been held to be fatal to it.[2] In Alabama, however, in a case of this description, it was considered that, upon a motion to quash the attachment, everything disclosed by the proceedings should be taken to be true; that the court would suppose the affidavit to have been regularly taken; and that if such was not the fact, it was to be taken advantage of by plea in abatement, and not by motion to quash.[3] Afterwards, in another case, of identical character, the defendant pleaded in abatement the want of the signature of the officer; to which the plaintiff replied that the affidavit was in point of fact made; to which replication the defendant demurred; and it was held, that the plea was fully answered by the replication, and that, though it would have been more regular for the officer to have certified the affidavit, the court were not prepared to say that his omission to do so necessarily vitiated the proceedings.[4] And, in the same State, where an affidavit was not signed by the clerk, and the defendant pleaded that fact in abatement of the writ, the court said that was an immaterial issue, and allowed the clerk to certify the affidavit after the plea in abatement was filed.[5] And in Iowa, where the affidavit was not signed by the affiant, nor certified by the clerk of the court, it was not considered a good ground for quashing the writ, when the court was satisfied from evidence that the affidavit was in fact sworn to before the writ issued, and that the failure of the plaintiff to sign the affidavit, and of the officer to certify it, resulted merely from oversight consequent upon the haste in which the act was done.[6] And so in Maryland,[7] and Arkansas.[8]

§ 91 *a*. If a person holding the office of clerk of a court institute a suit by attachment in that court, his affidavit cannot be made before his own deputy. If so made it is a nullity.[9]

§ 92. The next matter to be determined is, whether a particular affidavit, relied on to sustain the attachment, was, in fact,

[1] Singleton *v.* Wofford, 4 Illinois (3 Scammon), 576.

[2] Birdsong *v.* McLaren, 8 Georgia, 521; Watt *v.* Carnes, 4 Heiskell, 532; Cooper *v.* Smith, 25 Iowa, 269.

[3] Lowry *v.* Stowe, 7 Porter, 483.

[4] McCartney *v.* Branch Bank, 3 Alabama, 709. See Wiley *v.* Bennett, 9 Baxter, 581.

[5] Hyde *v.* Adams, 80 Alabama, 111.

[6] Stout *v.* Folger, 34 Iowa, 71.

[7] Farrow *v.* Hayes, 51 Maryland, 498.

[8] Fortenheim *v.* Claflin, 47 Arkansas, 49.

[9] Owens *v.* Johns, 59 Missouri, 89.

made in the attachment suit. This would seem to be easily ascertainable, by the title of the affidavit, or by its connection with the papers in the cause; but still there are reported cases on this point. An affidavit having no title, not referring to the summons or any other paper having the title, not stating who the deponent is, or what he has to do with the suit, or who is plaintiff or defendant, was held to be too indefinite to be the basis of an attachment.[1] But in Arkansas, where the affidavit was not entitled in the suit, and did not describe the person who made it, as plaintiff, or the debtor named in it as defendant, and was not attached to any of the original papers in the cause, it was considered sufficient.[2] And so in Florida.[3] And substantially so in Illinois,[4] Michigan,[5] and Texas.[6]

§ 93. There is ordinarily no difficulty in ascertaining whether the affidavit was made by one authorized by law to make it; for the statutory terms are usually sufficiently clear. Where the law requires it to be made by the plaintiff, and mentions no other person by whom it may be made, the rule applied to attachment bonds under like circumstances, that the act can be done by no other than the plaintiff,[7] would be adopted; though the Supreme Court of Alabama refused to apply it.[8] In the nature of things, however, such a rule would be subject to exceptions. Thus, it has been held, under such a statute, that an affidavit in an action by a corporation may be made by its agent.[9] So, where a suit was brought by A. to the use of B., and B.'s agent, describing himself as such, made the affidavit, it was considered that this met the terms of a statute requiring "the party applying for the attachment, his agent, attorney, or factor," to make the affidavit.[10] In Louisiana, however, an affidavit made by a third person, not appearing to have any knowledge of the matter, was held bad.[11] If it appear, however, by the record, that the affiant is a party to the suit, it is not necessary for him to make in the affidavit any allegation of his interest therein.[12]

[1] Burgess *v.* Stitt, 12 Howard Pract. 401.

[2] Cheadle *v.* Riddle, 6 Arkansas, 480; Kinney *v.* Heald, 17 Ibid. 397. See Ruthe *v.* Green Bay & M. R. R. Co., 37 Wisconsin, 344.

[3] West *v.* Woolfolk, 21 Florida, 189.

[4] Harris *v.* Lester, 80 Illinois, 307.

[5] Beebe *v.* Morrill, 76 Michigan, 114.

[6] Gray *v.* Steedman, 63 Texas, 95.

[7] *Post*, § 131; Myers *v.* Lewis, 1 McMullan, 54; Mantz *v.* Hendley, 2 Hening & Munford, 308; Pool *v.* Webster, 3 Metcalfe (Ky.), 278.

[8] Flake *v.* Day, 22 Alabama, 132.

[9] Trenton Banking Co. *v.* Haverstick, 6 Halsted, 171.

[10] Murray *v.* Cone, 8 Porter, 250.

[11] Baker *v.* Hunt, 1 Martin, 194.

[12] Bosbyshell *v.* Emanuel, 12 Smedes & Marshall, 63.

§ 93 *a*. In some States the law requires the affidavit to be "made by the plaintiff or *some person for him.*" In such cases, an affidavit made by a person other than the plaintiff will be held to have been made *for* the plaintiff, whether it be so stated therein or not. This was so ruled in a proceeding to reverse the judgment in the attachment suit,[1] and also in a case involving title to real estate, sold under execution in an *ex parte* attachment suit, which it was sought to have declared void because of the insufficiency of the affidavit to authorize the issue of an attachment.[2]

In California, where an attachment is issued by the clerk of the court, "upon his receiving an affidavit by or *on behalf* of the plaintiff," showing statutory grounds for issuing the writ; it was held, that a person making an affidavit on behalf of a plaintiff was not required to state whether his averments were based upon direct knowledge, or upon information and belief; and that when he stated facts positively without qualification, the court would imply that they were within his knowledge. And the court further said: "Neither is it required that the person who makes affidavit in behalf of the creditor should show that he is the agent of the creditor for the collection of the debt, or by express averment that he makes it in his behalf, or that the facts are peculiarly within his knowledge, or that there is any particular reason or excuse for the omission of the creditor to make the affidavit himself; and there is nothing in the policy of the law requiring the interpolation of such provisions by construction."[3]

In Wisconsin, however, where the statute requires the affidavit to be made by "the plaintiff, or *some one in his behalf*," an affidavit was made by a person other than the plaintiff, and failed to show that the affiant occupied the relation of agent, attorney, or officer to the plaintiff, or that he made the affidavit on behalf of the plaintiff, or that he had any knowledge of the amount of the indebtedness of the defendant in the attachment to the plaintiff; and it was held that the writ was no justification for seizing property of the defendant.[4] And where the affidavit recited, "J. K., on behalf of I. S., being duly sworn," etc., it was

[1] Mandel *v.* Peet, 18 Arkansas, 236. See Fremont C. Co. *v.* Fulton, 103 Indiana, 393; Stringer *v.* Dean, 61 Michigan, 196.

[2] Gilkeson *v.* Knight, 71 Missouri, 403; Johnson *v.* Gilkeson, 81 Ibid. 55.

[3] Simpson *v.* McCarty, 78 California, 175.

[4] Wiley *v.* Aultman, 53 Wisconsin, 560.

held insufficient, and that the affiant should have sworn that he made the affidavit on behalf of I. S.[1]

If, as in West Virginia, an attachment may issue, on the plaintiff's filing with the clerk of the court "his own affidavit or that of some *credible* person," stating the grounds for obtaining the writ; and an affidavit be made by a person other than the plaintiff; he will be presumed to be credible until the contrary appears; he need not state in the affidavit that he is a "credible person."[2]

§ 93 *b*. If a statute authorize an affidavit to be made by the plaintiff's agent or attorney, and it be made by a person other than the plaintiff, he must be described in the affidavit as agent or attorney, or it will be insufficient;[3] but if he was in fact the agent or attorney of the plaintiff, and omitted so to describe himself, he may amend the affidavit so as to show that fact;[4] or if the record show him to be the attorney, that is sufficient.[5] And if he be so described, he need not swear that he is an agent or attorney of the plaintiff.[6] Nor need it appear in the affidavit that he had personal knowledge of the facts sworn to,[7] or why the affidavit was not made by the plaintiff,[8] or what means the affiant had of knowing the facts sworn to.[9]

Where an affidavit may be made by an attorney of the plaintiff, that term is not confined to an attorney in fact, but includes an attorney at law.[10] But in Louisiana, it was held not to authorize an attorney at law, residing in another State, and employed to attend in the State of his residence to the collection of a debt, to come into Louisiana, without special authority from his client, and take out an attachment, making the affidavit himself.[11]

§ 94. When a statute permits an affidavit to be made by an agent, it is said that if he swear "to the best of his knowledge,"

[1] Miller *v.* Chicago, M. & St. P. R. Co., 58 Wisconsin, 310.

[2] Ruhl *v.* Rogers, 29 West Virginia, 779.

[3] Willis *v.* Lyman, 22 Texas, 268; Manley *v.* Headly, 10 Kansas, 88.

[4] Tracy *v.* Gunn, 29 Kansas, 508.

[5] Irwin *v.* Evans, 92 Missouri, 472.

[6] Wetherwax *v.* Paine, 2 Michigan, 555; Fremont C. Co. *v.* Fulton, 103 Indiana, 393; Irwin *v.* Evans, 92 Missouri, 472; Evans *v.* Lawson, 64 Texas, 199.

[7] Anderson *v.* Wehe, 58 Wisconsin, 615; Rice *v.* Morner, 64 Ibid. 599; White *v.* Stanley, 29 Ohio State, 423.

[8] White *v.* Stanley, 29 Ohio State, 423.

[9] Gilkeson *v.* Knight, 71 Missouri, 403; Irwin *v.* Evans, 92 Ibid. 472.

[10] Clark *v.* Morse, 16 Louisiana, 575; Austin *v.* Latham, 19 Ibid. 88.

[11] Wetmore *v.* Daffin, 5 Louisiana Annual, 496.

it will be sufficient.[1] So, where an attorney made affidavit of the nature and amount of the defendant's indebtedness, "upon information and belief derived from and founded upon the written admissions of the defendant, then in the attorney's possession," it was sustained.[2] So, where an attorney swore that he "is informed and believes *and therefore states*" that defendant "is justly indebted to plaintiff" in a certain sum, it was held sufficient.[3] But where he is required by the statute to swear "to the best of his knowledge and belief," it is not sufficient that he swear "to the best of his belief."[4] Where the statute authorized an affidavit to be made by an agent or attorney, if the plaintiff be absent from the county, "*in which case the affidavit shall state his absence*," the omission of this statement from an affidavit made by an attorney was held to vitiate it.[5]

§ 94 *a*. If the law require an averment in the affidavit of the *plaintiff's* knowledge or belief of the facts alleged, and a person other than the plaintiff makes the affidavit, it will be insufficient if he allege his own knowledge or belief; he should allege that of the plaintiff.[6] Under such a statute an affidavit was made by an agent on behalf of certain named individuals, partners, trading under the name of A. T. S. & Co., and alleging "that the said A. T. S. & Co. have good reason to believe," &c.; and it was objected to because it did not say that the individuals composing the firm "had good reason to believe," &c.; but the court overruled the objection.[7]

§ 95. In every affidavit for an attachment, there are two distinct parts, one relating to the plaintiff's cause of action and the amount due from the defendant to him, the other to the facts relied on as a ground for obtaining the writ.

In regard to the first, it is as necessary to comply with all the requirements of the law, as in reference to the second. If the law prescribe the terms in which the plaintiff shall allege his claim, those terms must be fulfilled, or the attachment will fail. Thus, where the law required the affidavit to show: 1. The nature of the plaintiff's claim; 2. That it is just; and 3. The

[1] Bridges *v.* Williams, 1 Martin, N. s. 98.

[2] Howell *v.* Kingsbury, 15 Wisconsin, 193.

[3] Mitchell *v.* Pitts, 61 Alabama, 219.

[4] Bergh *v.* Jayne, 7 Martin N. s. 609.

[5] Pool *v.* Webster, 3 Metcalfe (Ky.), 278.

[6] Dean *v.* Oppenheimer, 25 Maryland, 368.

[7] Stewart *v.* Katz, 30 Maryland, 334.

amount which the affiant believes the plaintiff ought to recover; the omission of the second of those allegations was held to be fatal.[1] So, where the statute required it to appear by affidavit that a cause of action exists against the defendant, specifying the amount of the same and the grounds thereof; and the affidavit omitted to state the grounds; it was held, that there was no jurisdiction in the court to issue the writ.[2] And under the same statute, an attachment was set aside because the affidavit merely recited the facts relied on as a cause of action, without a direct statement of their existence.[3] And under a statute requiring the plaintiff to show, by affidavit, that one of the causes of action specified in the statute existed against the defendant, and the affidavit alleged that the defendant owed the plaintiff a certain sum for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant, it was held not to show a cause of action in favor of the plaintiff, but to be a mere recital, from which the affiant concluded that such a right of action did exist; and that he should have stated that the plaintiff had in fact sold goods, wares, and merchandise to the defendant, of the value of the sum mentioned, or for which the defendant had agreed to pay that sum.[4] But where the action was upon a promissory note, alleged to be wholly unpaid, it was held sufficient to aver those facts.[5]

Under a statute requiring the affidavit to state the nature of the plaintiff's claim, it was considered sufficient to state that the claim was for a certain sum "now due and payable to the plaintiff from the defendants on an account for merchandise sold by the defendants as auctioneers on commision for the plaintiff."[6] And so, under a statute requiring the affidavit to state the amount of the defendant's indebtedness, "and that the same is due upon contract, express or implied," an affidavit was sustained, which stated the amount, and "that the same is due upon contract, express or implied;" it being considered unnecessary to specify the particular description of contract sued upon.[7] And under that statute an affidavit was sustained

[1] Taylor v. Smith, 17 B. Monroe, 536; Worthington v. Cary, 1 Metcalfe (Ky.), 470; Allen v. Brown, 4 Ibid. 342; Bailey v. Beadles, 7 Bush, 383.

[2] Zerega v. Benoist, 7 Robertson, 199; 33 Howard Pract. 129; Richter v. Wise, 6 New York Supreme Ct. 70.

[3] Manton v. Poole, 67 Barbour, 330.

[4] Pomeroy v. Ricketts, 34 New York Supreme Ct. 242; Smith v. Davis, 36 Ibid. 306.

[5] Hamilton v. Penney, 36 New York Supreme Ct. 265.

[6] Ferguson v. Smith, 10 Kansas, 394. See Dorrington v. Minnick, 15 Nebraska, 397.

[7] Klenk v. Schwalm, 19 Wisconsin,

which omitted those words, but contained an averment of facts, which, if true, constituted an express contract.[1] And where the statute required the affidavit to *show* that the plaintiff's claim is just, an affidavit which failed to *state* that, but stated facts which showed the claim to be just, was sustained.[2] And if the plaintiff's claim appears in the affidavit to be one for which an attachment may issue, but the statement is not as full as might be desired, reference may be had to the petition.[3]

It is no objection to an affidavit that the facts set forth in it, or in the petition, would seem to show that the plaintiff might have claimed a larger sum in the suit than he did.[4] And it is not essential that the amount should be set forth *in terms* in the affidavit, if the form of pleading be such as to require it to be stated in the petition, and it be there stated, and be referred to in the affidavit as the sum for which the attachment is obtained.[5] Such, however, would not be the case where the common-law forms of pleading are preserved. But where the cause of action and the ground of attachment are both required to be set forth in the petition, and the affidavit refers only to the latter, the attachment cannot be sustained, for there is nothing showing, under oath, what amount is due.[6]

The following case came up in Louisiana, where it is required by the Code of Practice that the plaintiff shall make a declaration under oath, at the foot of the petition, "*stating the amount of the sum due him.*" The affidavit stated that the defendants were indebted to the plaintiff "in a sum exceeding two thousand dollars," and it was decided that it was specified with sufficient certainty that *at least* that sum was due, and that the attachment might well lie for that sum, and as it did not issue for a greater, it could not be dissolved.[7] Under the same law, however, it was held, that where any sum the plaintiff might state would be conjectural, it could not serve as the basis of a positive oath, and an attachment would not lie; the case being that of

111. See Cope *v.* U. M. M. & P. Co., 1 Montana, 53.

[1] Ruthe *v.* Green Bay & M. R. R. Co., 37 Wisconsin, 344.

[2] Wilkins *v.* Tourtellott, 28 Kansas, 825.

[3] Hart *v.* Barnes, 24 Nebraska, 782.

[4] Henrie *v.* Sweasey, 5 Blackford, 273; Evans *v.* Lawson, 64 Texas, 199

[5] Boone *v.* Savage, 14 Louisiana, 169; Souberain *v.* Renaux, 6 Louisiana Annual, 201; Morgan *v.* Johnson, 15 Texas, 568; Watts *v.* Harding. 5 Ibid. 386; Whitemore *v.* Wilson, 1 Texas Unreported Cases, 213.

[6] Blakley *v.* Bird, 12 Iowa, 601; Kelly *v.* Donnelly, 29 Ibid. 70; Price *v.* Merritt, 13 Louisiana Annual, 526.

[7] Flower *v.* Griffith, 12 Louisiana, 345. *Sed contra*, Jones *v.* Webster, 1 Pinney, 345.

one partner suing another for a specific amount, as a debt resulting from the partnership transactions, when there had been no settlement of the partnership accounts.[1]

Where the law required the affiant to state "that the amount of debt or sum demanded is actually due," it was considered, on a contest of the truth of the affidavit, not to mean that the precise amount stated was actually due, but that the day of payment had arrived according to the contract; and that, if the amount shown to be due was sufficient to give the court jurisdiction, the attachment should not be discharged, unless the discrepancy between the amount claimed and the amount proved was so material as to warrant the imputation of fraud or bad faith on the part of the plaintiff.[2]

Where the law required the plaintiff to "make oath to the debt or sum demanded, and that no part of the same is paid, and that he doth not in any wise, or upon any account whatever, stand indebted to the defendant," a plaintiff made affidavit to the amount of his claim and that no part thereof was paid, and "that he is indebted to the defendant some small amount, but he does not know how much, contracted since this note was given;" and it was held sufficient.[3]

In Georgia this case is reported. The affidavit stated that the defendant "was indebted to the plaintiff in the sum of one thousand dollars, which may be subject to a set-off, for an unascertained sum which, on final setlement, will be due the defendant, from plaintiff, for certain improvements," &c. It was objected that no certain sum was sworn to; but the court ruled otherwise, saying: "Any debt may be subject to be set off by another debt. But until one debt has been set against another, both remain debts. When there is an action, there can be no set-off until the defendant has done something showing a willingness in him for his debt to be set against the plaintiff's debt."[4] But in Wisconsin, an affidavit was considered too vague and uncertain, which alleged that the defendant was indebted to the plaintiff "in the sum of $282.66, not deducting certain counter demands and set-off claims against the above claim, in favor of said defendant, the exact amount of which counter demands this affiant is not knowing."[5] And, in Texas, under a statute requiring the plaintiff to make affidavit "stating that defendant is justly indebted to the plaintiff, and the amount of the demand," an

[1] Levy v. Levy, 11 Louisiana, 581.
[2] Zinn v. Dzialynski, 13 Florida, 597.
[3] Turner v. McDaniel, 1 McCord, 552.
[4] Holston Man. Co. v. Lea, 18 Georgia, 647.
[5] Morrison v. Ream, 1 Pinney, 244.

affidavit was considered bad, which admitted that the defendant was entitled to a credit for a payment made on one of the notes sued on, but failed to state *when* the payment had been made.[1]

Under a statute requiring "an affidavit, stating that the defendant is indebted to the plaintiff, and specifying the amount of such indebtedness as near as may be, over and above all legal set-offs," an affidavit was held bad, which stated that the defendant was indebted to the plaintiff "in the sum of $1,657.90, *as near as this deponent can now estimate the same*, over and above all legal set-offs." The court said: "The statute gives no latitude of *statement in the affidavit* as to the amount due. Some fixed and definite sum, to which the affiant can positively depose, must be named. In estimating the amount, so positively stated, the utmost exactness is not required. It may be a little more or a little less than the real amount without vitiating the proceedings, provided that the sum be such that the affiant can conscientiously depose to its correctness. But the amount named must be certain, leaving no room for speculation on the face of the affidavit."[2] Much more will an affidavit be fatally defective, which wholly omits a statement of the amount of the defendant's indebtedness.[3]

And where the statute required the affidavit to show that the plaintiff "is entitled to recover a sum stated therein, over and above all counterclaims known to him;" and the affidavit stated that "the defendant is indebted to the plaintiff in the" sum stated, and that the plaintiff "is justly entitled to recover said sum," but did not allege that the sum stated was "over and above all counterclaims known to him;" it was held, that the affidavit was insufficient; that though the very words of the statute need not be followed, there should be used equivalent words; and that the words used in the affidavit were not equivalent to those of the statute.[4] And under the same statute, where the affidavit said "over and above all discounts and set-offs," it was held not to be a compliance with the law; "counterclaims"

[1] Espey *v.* Heidenheimer, 58 Tex. 662.

[2] Lathrop *v.* Snyder, 16 Wisconsin, 293. See Hawes *v.* Clement, 64 Ibid. 152. And where, in Texas, a plaintiff prayed for a writ of attachment for one amount, but stated in his petition the amount of his demand at a different sum, and in his affidavit for attachment stated it at still another sum, the writ was quashed because of the variance. Joiner *v.* Perkins, 59 Texas, 300.

[3] Marshall *v.* Alley, 25 Texas, 342.

[4] Donnell *v.* Williams, 28 New York Supreme Ct. 216; cited approvingly by the Court of Appeals in Ruppert *v.* Haug, 87 New York, 141; Lyon *v.* Blakesly, 26 New York Supreme Ct. 299; Taylor *v.* Reed, 54 Howard Pract. 27.

being considered to be broader, and to include more than "discounts and set-offs."[1] And under the same statute, where an affidavit was made by an agent of the plaintiff, stating that the plaintiff was justly entitled to recover the sum named, "over and above all counterclaims, discounts, and set-offs existing in favor of the defendant, *to the knowledge of deponent*," it was held that the affidavit was bad to sustain the attachment, as against a subsequent attacher, because it did not state that the amount was due, "over and above all counterclaims existing in favor of the defendant to the knowledge of the *plaintiff*."[2] And where, under the same statute, an affidavit was made by the plaintiff's attorney, which stated that the plaintiffs were entitled to the sum claimed "over and above all counterclaims known to plaintiffs," but did not show that the attorney had any knowledge or information as to whether the plaintiffs knew of counterclaims; the affidavit was held bad.[3]

§ 96. If the statute do not require it to be stated how the debt accrued, it is no objection to the affidavit that it is not stated;[4] but if required, a failure to state it will be fatal.[5] If the affidavit make no reference to the declaration or petition, as indicating the cause of action, it will be understood as being the same therein set forth; and if it state that the defendant is indebted in any other manner than as therein declared, it will be bad; for the debt sued on must be the one sworn to.[6] Where a statute required the plaintiff to state in his affidavit the nature and amount of the defendant's indebtedness, a statement that the defendant was indebted "in the sum of fourteen hundred dollars by his certain instrument of writing signed by him," was deemed sufficient.[7] So, where the statute required the affidavit to show "the nature of the plaintiff's claim," and it averred "that said defendant is justly indebted to said plaintiff in the sum of $803.45, a balance due on account for goods sold and delivered," it was sustained.[8]

[1] Lampkin *v.* Douglass, 10 Abbott's New Cases, 342. But see a different ruling in the same case in 34 New York Supreme Ct. 519, and in Alford *v.* Cobb, 35 Ibid. 22.

[2] Murray *v.* Hankin, 37 New York Supreme Ct. 87.

[3] Cribben *v.* Schillinger, 37 New York Supreme Ct. 248.

[4] Starke *v.* Marshall, 8 Alabama, 44; O'Brien *v.* Daniel, 2 Blackford, 290; Irvin *v.* Howard, 37 Georgia, 18.

[5] *In re* Hollingshead, 6 Wendell, 553; Smith *v.* Luce, 14 Ibid. 237; People *v.* Blanchard, 61 Michigan, 478.

[6] Cross *v.* Richardson, 2 Martin, N. S. 323.

[7] Phelps *v.* Young, 1 Illinois (Breese), 255; Haywood *v.* McCrory, 33 Ibid. 459.

[8] Theirman *v.* Vahle, 32 Indiana, 400.

§ 96 *a*. It is of importance that the cause of action set forth in the affidavit should appear to be the same as that shown in the declaration or petition; for if there be a material variance between them, it will vitiate the attachment, and may be taken advantage of by plea in abatement [1] or motion to quash.[2] Thus, where the statute authorized an attachment where the "damages for which the action is brought are from injuries arising from the commission of some felony or misdemeanor," and an attachment was obtained on an affidavit alleging the ground of attachment in those words; but the cause of action in the petition was upon an account stated; the plaintiff was not allowed to introduce evidence to sustain the affidavit, and the attachment was set aside.[3]

§ 97. The most important point in the affidavit is that which sets forth the grounds on which the attachment is sued out; and it is in reference to that, that the great mass of the decisions concerning affidavits have been rendered.

This subject presents itself, under different statutes, in three distinct phases: I. Where the affidavit is required simply to state the existence of a particular fact, declared by law to be a ground of attachment; II. Where the existence of such fact must be proved to the satisfaction of some named officer; and III. Where the officer must be satisfied of the existence of such fact, by proof presented to him of the facts and circumstances which go to establish its existence. Let us examine these points.

§ 98. I. *Where the affidavit must state simply the existence of a particular fact as a ground of attachment.* Here, nothing is requisite but conformity to the language of the statute. The affidavit, as we shall presently see, need not be literally according to the words of the law; a substantial compliance is sufficient.[4] The officer whose duty it is to issue the writ inquires only whether there is this conformity. If he finds it to exist, he issues the writ in a ministerial, not in a judicial, capacity. He is not to be satisfied judicially that the alleged fact is true; but is simply to see whether it is sworn to. If sworn to, he is fully justified in issuing the process, and cannot be affected by any subsequent ascertainment of the groundlessness or falsity of the affidavit.[5]

[1] Wright *v.* Snedecor, 46 Alabama, 92.

[2] Evans *v.* Tucker, 59 Texas, 249.

[3] Deering *v.* Collins, 38 Missouri Appeal, 80.

[4] *Post*, § 107.

[5] In Wheeler *v.* Farmer, 38 California, 203, the court said: "The objection that the affidavit does not state the probative

In cases of this description the statutes of some States require the affidavit to allege that the affiant "has good reason to believe and does believe" the existence of the fact alleged as a ground for the attachment; and there an allegation in those words would be sufficient. But in other States an affidavit is required "showing" the existence of a statutory ground. In such case, it is considered, in Ohio, that the averment of the affiant's *belief* of its existence, unaccompanied with any statement of facts on which the belief is founded, does not allege that existence, and is not a compliance with the law.[1]

§ 99. II. *Where the existence of the ground of attachment must be proved to the satisfaction of the officer.* In this case, the officer acts in a judicial as well as a ministerial capacity. His judgment must be satisfied that the fact exists, before he issues the writ; and if it nowhere appears that he was so satisfied, the attachment may be quashed.[2] And where the statute required him to indorse on the affidavit that he was so satisfied, such indorsement was considered an indispensable prerequisite to the issuing of the writ, and that the officer could not be permitted to come into court, pending the suit, and indorse his satisfaction *nunc pro tunc*.[3] In every such case evidence must be presented to, and acted on by, the officer. He cannot act upon his own knowledge, or mere belief, however well founded it may be, nor upon report or information. If proof be presented to him, a mere error in judgment as to its legality or sufficiency will impose no liability on him; but there must be *some* proof. If he issues the writ without proof, he is liable to the defendant as a trespasser.[4] If the proof has a legal tendency to make out the case required by the statute, although it be so slight and incon-

facts necessary to establish the ultimate facts required by statute to be shown as the basis of the writ, is not well taken. Under our statute it is the duty of the clerk of the court in which the suit is commenced, to issue the writ upon the filing by the plaintiff of an affidavit stating the ultimate facts in the language of the statute, together with an undertaking, in amount and form as defined by statute. Upon such compliance with the statute, the plaintiff demands as a right the issuance of the writ, and, in issuing the writ, the clerk has no discretionary power. He but performs a ministerial duty in obedience to a plain statutory mandate." See Reyburn *v.* Brackett, 2 Kansas, 227; Connelly *v.* Woods, 31 Ibid. 359; Sharpless *v.* Ziegler, 92 Penn. State, 467; Boyd *v.* Lippencott, 2 Penn. County Ct. 585; Ferris *v.* Carlton, 8 Philadelphia, 549; Ellison *v.* Tallon, 2 Nebraska, 14; Harrison *v.* King, 9 Ohio State, 388; Coston *v.* Paige, Ibid. 397; Mayhew *v.* Dudley, 1 Pinney, 95; Crawford *v.* Roberts, 8 Oregon, 324.

[1] Dunlevy *v.* Schartz, 17 Ohio State, 640; Garner *v.* White, 23 Ibid. 192.

[2] Mayhew *v.* Dudley, 1 Pinney, 95; Morrison *v.* Fake, Ibid. 133.

[3] Slaughter *v.* Bevans, 1 Pinney, 348.

[4] Vosburgh *v.* Welch, 11 Johnson, 175.

clusive that, upon a direct proceeding to review it, the officer's action in granting the writ would be reversed, yet in a collateral action the process will be deemed valid. It will be so deemed because the officer, having proof presented to him, and being required by law to determine upon the weight of the proof, has acted judicially in making his determination. His decision may be erroneous, but it is not void.[1]

The first point, then, to be determined is, what is competent evidence to present to the officer? It must be legal evidence; not the plaintiff's own oath, unless the statute expressly say so.[2]

The next point is, what is sufficient proof? The Supreme Court of New York sustained an attachment issued by a justice of the peace, upon affidavits made by witnesses that they *believed* the defendant resided out of the State.[3] The legislature of that State afterwards modified the statute, so as to prevent the issue of attachments on the ground of mere belief; but COWEN, J. after the change, upon a review of the authorities in similar cases in other branches of the law, said that under the previous statute — the same which was construed in the decision of the Supreme Court just referred to — he should not hesitate in receiving the oath of mere belief.[4]

Under the New York Code of Procedure it is held that an affidavit alleging facts "on information and belief" is insufficient, if it do not show that the persons from whom the affiant professes to have obtained the information are absent, or that their depositions cannot be procured.[5]

§ 100. III. *Where the officer must be satisfied of the existence of the ground of attachment by proof of particular facts and circumstances tending to establish its existence.* In this case, as in the last, the officer acts both judicially and ministerially. He passes judicially upon the competency of the evidence, and also upon the sufficiency of the proof to establish the existence of the ground of attachment. For instance, if the statute authorize an attachment "whenever it shall satisfactorily appear to the officer that the defendant is about to remove from the county any of his property, with intent to defraud his creditors," and require nothing more, it would be a case of the description mentioned

[1] Skinnion v. Kelley, 18 New York, 355; Hall v. Stryker, 27 Ibid. 596; Easton v. Malavasi, 7 Daly, 147; Allen v. Myer, Ibid. 229.

[2] Brown v. Hinchman, 9 Johnson, 75.

[3] Matter of Fitch, 2 Wendell, 298.

[4] *Ex parte* Haynes, 18 Wendell, 611.

[5] Yates v. North, 44 New York, 271; Steuben County Bk. v. Alberger, 78 New York, 252.

under the next preceding head; and under the views expressed by the New York court, an affidavit of belief would be sustained, if the officer acted upon it as sufficient; but if the statute further require that, before the attachment shall issue, "the plaintiff shall prove to the satisfaction of the officer the *facts and circumstances* to entitle him to the same," then a new exigency is created, requiring evidence, which he shall deem competent, to be given of those facts and circumstances; and that the facts and circumstances, when proved, shall satisfy him that the particular ground of attachment relied on exists. Hence, though the facts and circumstances be proved by competent evidence, if they do not in his judgment prove the main fact, he should not issue the writ; and if he do issue it, his action is liable to be revised and overruled, either on the ground that the evidence submitted to him was incompetent, or that it was insufficient. And when his jurisdiction to issue the writ is in question, the point is not whether there was before him conclusive evidence of the facts relied on, but it is sufficient if the proof had a legal tendency to make out in all its parts a case for issuing the writ. In order to defeat his jurisdiction it must be made to appear that there is a total want of evidence upon some essential point.[1]

In reference to the affidavit in such a case, it has been decided that the *belief* of the affiant that the defendant was about to do a particular act, the impending performance of which would authorize an attachment, would not sustain an attachment. "The plaintiff's own belief," said the court, "is neither a fact nor a circumstance upon which the justice can exercise his judgment. It is not sufficient that the plaintiff is satisfied of the unlawful acts or intentions of the defendant. The justice must be satisfied, and he must be so satisfied from proof of facts and circumstances; not the belief of any one."[2] It has likewise been held, that an affidavit stating the *information and belief* of the party making it, as to certain facts, is not sufficient proof to authorize the writ to issue.[3] And though the affidavit was unqualified in its terms that the defendant had left the State with intent to defraud his creditors, it was held insufficient, because it did not

[1] Schoonmaker *v.* Spencer, 54 New York, 366; Tanner & D. E. Co. *v.* Hall, 22 Florida, 391.

[2] Smith *v.* Luce, 14 Wendell, 237; Mott *v.* Lawrence, 17 Howard Pract. 559; Lorrain *v.* Higgins, 2 Chandler, 116; 2 Pinney, 454.

[3] Tallman *v.* Bigelow, 10 Wendell, 420; *Ex parte* Haynes, 18 Ibid. 611; Matter of Faulkner, 4 Hill (N Y.), 598; Matter of Bliss, 7 Ibid. 187; Pierse *v.* Smith, 1 Minnesota, 82; Morrison *v.* Lovejoy, 6 Ibid. 183.

state the facts and circumstances. The court said: "Affirming that a party has left the State with intent to defraud his creditors, may be predicated more upon matters of opinion, or belief, than upon fact. The affirmant may honestly believe, and thus affirm it in general terms; whereas, if called to state the facts and circumstances upon which he reached the conclusion, the officer (being unable to exercise his judgment in the matter) might well differ from him."[1] But where the matter to be proved is in itself a single and complete fact, not depending on other facts and circumstances to establish its existence, an affirmation of the fact in direct terms is sufficient. Such is the case where the non-residence of the defendant is the ground of attachment. There, no "facts and circumstances" are needed to prove the non-residence; itself is the fact and circumstance.[2] But in such case of a single fact, no more than in any other, is the affidavit of *belief* competent proof.[3]

While, however, it is not sufficient for an affidavit to state facts merely upon the information and belief of the party, yet information is not to be entirely rejected as evidence. Thus, where the allegation is, that the debtor has absented himself from his residence in an illegal manner, information obtained from his family, on inquiry at his residence, may be admitted, *in connection with other facts*, to show that he has left home, when he went away, where and upon what business he went, and how long he intended to be absent. But such evidence, obtained from other sources, would not be admissible. The informant should be called. It may be, too, that the party making the affidavit should be allowed to speak upon information concerning the solvency of the debtor, provided the information come from persons who are not interested in the proceedings against him. But an affidavit that the party has been informed and believes that the debtor is insolvent, that he owes a large amount of money, or the like, without the addition of any fact within the knowledge of the party, or stating when or from whom the intelligence was received, cannot be regarded as of any legal importance.[4] But where, in any case, information is allowed to be stated in the affidavit, it will be of no value, unless the party swear that he believes it to be true.[5]

[1] *Ex parte* Robinson, 21 Wendell, 672.
[2] Matter of Brown, 21 Wendell, 316.
[3] Kingsland *v.* Cowman, 5 Hill (N. Y.), 608.
[4] Matter of Bliss, 7 Hill (N. Y.), 187.
[5] Decker *v.* Bryant, 7 Barbour, 182.

§ 101. Usually the plaintiff may allege as many distinct and separate grounds of attachment, within the terms of the law, as he may deem expedient.[1] In doing so, the several grounds should be stated cumulatively; and if any one of them be true, it will sustain the attachment, though all the others be untrue.[2] And if the defendant leave one of the causes uncontested, it will sustain the attachment, though he successfully contest the others.[3] And if one of the grounds be sufficiently sworn to, and the other not, the former will sustain the attachment.[4]

But care should be taken that there be no inconsistency between any two of the grounds stated, for that introduces an element of indefiniteness and uncertainty in the affidavit which may vitiate the attachment. Thus, where the statute, in enumerating the grounds of attachment, set forth as the ninth that "the defendant *has* disposed in whole or in part of his property, with intent to defraud, :" etc.; and as the tenth, that he is "*about* to dispose of his property with intent," etc.; the affidavit which alleged both was held defective for uncertainty, and the attachment was quashed.[5] But it was not so regarded in Minnesota.[6] And in Alabama an affidavit was sustained, which averred that the defendant "is about fraudulently to dispose of his property, and has fraudulently disposed of a part of his property, and has money, property, and effects, liable to satisfy his debts, which he fraudulently withholds."[7] And in Texas an affidavit was considered good which alleged "that defendants are about to dispose of their property with intent to defraud their creditors; and that the defendants are about to convert their property into money for the purpose of placing it beyond the reach of their creditors."[8]

§ 101 *a*. An affidavit alleging one *or* the other of two or more distinct grounds would be bad, because of the impossibility of determining which is relied on to sustain the attachment. Thus, under a statute which authorized an attachment —

[1] Kennon *v.* Evans, 36 Georgia, 89; Irvin *v.* Howard, 37 Ibid. 18.

[2] McCollem *v.* White, 23 Indiana, 43; Lawyer *v.* Langhans, 85 Illinois, 138; Rosenheim *v.* Fifield, 12 Bradwell, 302; Prins *v.* Hinchliff, 17 Ibid. 153; Ruhl *v.* Rogers, 29 West Virginia, 779.

[3] Keith *v.* Stetter, 25 Kansas, 100.

[4] Dunlap *v.* McFarland, 25 Kansas, 488.

[5] Dunnenbaum *v.* Schram, 59 Texas, 281. The court considered this case distinguishable from those of a contrary tenor cited under § 102 *post*, because in them the law *embraced both the acts as one ground*; while in Texas the law states them as two distinct grounds. An examination of those cases proves that the fact is as stated by the Texas court.

[6] Nelson *v.* Munch, 23 Minnesota, 239.

[7] Smith *v.* Baker, 80 Alabama, 318.

[8] Cleveland *v.* Boden, 63 Texas, 103.

1. Where the defendant is about to remove his effects; 2. Where he is about to remove privately out of the county; and 3. When he absconds or conceals himself, so that the ordinary process of law cannot be served on him — an attachment was obtained, on an affidavit that the defendant "was about to remove from and without the limits, or so absconds and conceals himself, that the ordinary process of law cannot be served on him;" and it was set aside. The first member of the oath was plainly not within the statute, and though the latter was, yet it was rendered inefficient by its connection with the former, through the disjunctive conjunction *or*, whereby it became uncertain which state of facts existed.[1] Subsequently the same court, in a similar case, so ruled again, and intimated that they would consider an affidavit in the disjunctive as bad, although either of the facts sworn to might be sufficient.[2]

In Tennessee the statute authorizes two or more grounds of attachment to be stated in the alternative; but it was held there, that if a valid ground be associated in that way with *some other fact which is no ground*, it is not equivalent to a positive charge that any cause of attachment exists, and the affidavit is therefore bad.[3]

§ 102. Where the disjunctive *or* is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same results, the construction just mentioned would be inapplicable. For instance, where the statute authorized an attachment when "the defendant absconds, or secretes himself," it was considered that, from the difficulty of determining which was the fact, the language comprised but one ground, and the disjunctive *or* did not render the affidavit uncertain.[4] "It is," said the court,

[1] Hagood *v.* Hunter, 1 McCord, 511. See Barnard *v.* Sebre, 2 A. K. Marshall, 151; Davis *v.* Edwards, Hardin, 342; Bishop *v.* Fennerty, 46 Mississippi, 570; Dickenson *v.* Cowley, 15 Kansas, 269; Kegel *v.* Schrenkheisen, 37 Michigan, 174. The Court of Appeals of Kentucky holds that a statement in the alternative of two grounds of attachment is not vicious. Wood *v.* Wells, 2 Bush, 197; Hardy *v.* Trabue, 4 Ibid. 644.

[2] Devall *v.* Taylor, Cheves, 5. See Jewel *v.* Howe, 3 Watts, 144; Wray *v.* Gilmore, 1 Miles, 75; Shipp *v.* Davis, Hardin, 65; Hawley *v.* Delmas, 4 California, 195; Rogers *v.* Ellis, 1 Handy, 48; 1 Disney, 1; People *v.* Recorder, 6 Hill (N. Y.), 429; Stacy *v.* Stichton, 9 Iowa, 399; Hopkins *v.* Nichols, 22 Texas, 206; Garner *v.* Burleson, 26 Ibid. 348; Culbertson *v.* Cabeen, 29 Ibid. 247; Carpenter *v.* Pridgen, 40 Ibid. 32; Guile *v.* McNanny, 14 Minnesota, 520; Morrison *v.* Fake, 1 Pinney, 133.

[3] Haynes *v.* Powell, 1 Lea, 347.

[4] Johnson *v.* Hale, 3 Stewart & Porter, 331.

"often difficult, if not impracticable, for the creditor to ascertain whether his debtor absconds or secretes himself: he has to rely frequently upon such information as his family or friends will give him, which cannot always be confided in: hence, to allow sufficient latitude to the creditor in making his affidavit, and to prevent failures, from having mistaken the cause why the debtor is liable to the remedy, the law has very properly provided for its issuance in the alternative." [1]

Under a similar statute, the same view has been expressed in Tennessee. The language of the statute was, "so absconds or conceals himself that the ordinary process of law cannot be served on him." It was contended that "absconds" constituted one cause, and "conceals" another; but it was not so held. "For," said the court, "although the two words are connected by *or* instead of *and*, yet the sense of the sentence shows that *or* is used copulatively, constituting both 'absconds' and 'conceals,' or either of them, a sufficient cause for suing out the attachment. In the nature of things, a plaintiff cannot tell whether a party absconds or conceals himself. He may suppose he absconds, when he only conceals himself, and *vice versa*. To compel him to swear that the party is doing the one only, would involve the plaintiff in endless difficulty. Besides the question of conscience, that must always exist with the party about to take the oath, he would be constantly in danger of having his attachment abated on the plea of the defendant, who though he might not have absconded, was nevertheless concealed, or, if not concealing himself, may have been absconding. We think, therefore, that the words 'so absconds or conceals himself' constitute but one cause." [2] And so, in Mississippi, under a statute allowing attachment on affidavit that the defendant "hath removed, or is removing out of the State, or so absconds, or privately conceals himself, that the ordinary process of law cannot be served on him." The affidavit was in the very words of the statute, and was objected to, because in the alternative; but the court held it sufficient; considering that the material point required by the statute was, that the ordinary process could not be served, and that the plaintiff might well know that, without knowing whether the defendant had removed, absconded, or concealed

[1] Cannon *v.* Logan, 5 Porter, 77. See Wood *v.* Wells, 2 Bush, 197; Penniman *v.* Daniel, 90 N. Carolina, 154.

[2] Conrad *v.* McGee, 9 Yerger, 428. See Goss *v.* Gowing, 5 Richardson, 477; Commercial Bank *v.* Ullman, 10 Smedes & Marshall, 411; Hopkins *v.* Nichols, 22 Texas, 206; Wagonhorst *v.* Dankel, 1 Woodward's Decisions, 221; Sandhegar *v.* Hosey, 26 West Virginia, 221.

himself.[1] And in New York, an affidavit that the defendant "had secretly departed from this State, with intent to defraud his creditors, or to avoid the service of civil process, or keeps himself concealed therein with the like intent," was sustained.[2] And in Wisconsin and Nebraska, an affidavit was considered good, which alleged that the defendant "has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, his property, with intent to defraud his creditors."[3] And so in Indiana, where the affidavit was that the defendant "is about to sell, convey, or otherwise dispose of his property subject to execution, with the fraudulent intent to cheat, hinder, or delay his creditors."[4] And in Colorado an affidavit was sustained, which averred, in the words of the statute, that the defendant "is converting, or is about to convert, his property into money, or is otherwise about to dispose of his property, with the intent of placing it beyond the reach of the plaintiff."[5] And in Texas an affidavit, in the words of the statute, that the defendants "were about to convert their property, or a part thereof, into money, for the purpose of placing it beyond the reach of their creditors," was considered not open to the objection that it alleged two separate grounds, in the alternative.[6]

In California an attachment may issue "in an action upon a contract, express or implied, for the direct payment of money, where the contract is . . . not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." Under this statute an attachment was obtained on an affidavit which, after stating the indebtedness, concluded with these words: "And that the payment of the same has not been secured by any mortgage or lien upon real or personal property; or, if originally so secured, that such security has, without any act of the plaintiff or the person to whom the security was given, become valueless." The defendant moved to dissolve the attachment, which motion was granted; and the Supreme Court held it to have been rightly granted, and said: "It would be proper to follow the language of the statute, in saying that payment had 'not been secured by any mortgage or lien

[1] Bosbyshell *v.* Emanuel, 12 Smedes & Marshall, 63. See Irvin *v.* Howard, 37 Georgia, 18.

[2] Van Alstyne *v.* Erwine, 1 Kernan, 331.

[3] Klenk *v.* Schwalm, 19 Wisconsin, 111; Morrison *v.* Fake, 1 Pinney, 133; Tessier *v.* Englehart, 18 Nebraska, 167.

[4] Parsons *v.* Stockbridge, 42 Indiana, 121.

[5] McCraw *v.* Welch, 2 Colorado, 284.

[6] Blum *v.* Davis, 56 Texas, 423.

upon real or personal property, or any pledge of personal property,' because it includes two or more phases of the same fact, attended with the same results, namely, that no security had ever been given; but to use the above language, and then say, '*or*, if originally so secured, such security has become valueless,' is not to state either with certainty. It does not say that no security was ever given; neither does it say that security was given, but that the same has become valueless."[1]

§ 103. Qualifying words contained in the statute should appear in the affidavit; but the omission of words which have not that character, while, by those remaining, the sense and scope of the law are fulfilled, will not vitiate the affidavit. Thus, where it was required that the affidavit should state that the defendant is "justly indebted," to the plaintiff, it was considered that "justly" was not intended to qualify "indebted," and that its omission from the affidavit was no material defect.[2] So, where the statute required the affidavit to state that the plaintiff's claim "is just," it was considered to be a substantial compliance with the law to state that "the plaintiff is justly entitled to recover."[3] And so, where the law required affidavit that the debt or demand "is a just claim," and this was omitted, but the amount of the debt was stated, and that it was on the defendant's note under seal, promising to pay a certain sum at a certain time; it was held by the Supreme Court of the United States that the attachment could not for this omission be set aside in a collateral proceeding.[4] So where the statute required the affidavit to state that the defendant "is in some manner about to dispose of his property with intent to defraud his creditors," it was held that the omission of the words "in some manner" did not vitiate the affidavit.[5] So, under a statute requiring an affidavit that the defendant is justly indebted to the plaintiff "in a sum exceeding fifty dollars," and that the sum should be specified, a statement of the defendant's indebtedness in the sum of $300 was held sufficient, without inserting the words, "in a sum exceeding the sum of fifty dollars."[6] So, under a statute requiring the affidavit to state "that the defendant is indebted to the plaintiff, and specifying the amount of such indebtedness, as

[1] Wilke *v.* Cohn, 54 California, 212; Winters *v.* Pearson, 72 Ibid. 553.

[2] Livengood *v.* Shaw, 10 Missouri, 273. See Kennedy *v.* Morrison, 31 Texas, 207. *Sed contra*, Thompson *v.* Towson, 1 Harris & McHenry, 504.

[3] Gutman *v.* Virginia Iron Co., 5 West Virginia, 22.

[4] Ludlow *v.* Ramsey, 11 Wallace, 581.

[5] Drake *v.* Hager, 10 Iowa, 556.

[6] Hughes *v.* Martin, 1 Arkansas, 386; Hughes *v.* Stinnett, 9 Ibid. 211.

near as may be, over and above all legal set-offs," an affidavit stating indebtedness in a given sum over and above all legal set-offs, but omitting the words "as near as may be," was sustained.[1] Under a statute requiring the affidavit to state that the indebtedness sworn to "is due upon contract express or implied," it was considered that the word *due* was intended, not only to show that the demand arose upon contract, but also to indicate that the time for the payment of the debt had arrived; and that the omission to aver that the debt was "due upon contract" was fatal, though from the terms of the affidavit it was very clear that it arose from contract.[2] This position was, however, afterwards abandoned, and it was held, that an averment that the defendant "is indebted" to the plaintiff was a sufficient affidavit that the debt was *due*.[3]

§ 103 *a*. In Texas, the courts have from the first exhibited great rigidness in demanding that attachment proceedings should strictly comply with the statutory requirements. Said the Supreme Court of the State, following the rulings of the Supreme Court of the Republic, "The remedy by attachment, while necessary to secure the right of the creditor, is oppressive on the debtor; and, as against the plaintiff, has invariably in this country been subjected to rigid rules of construction. It is summary in its action, and the plaintiff, on whom it confers advantages so signal, must comply with all the incidents pertaining to this mode of redress." Under this view of the remedy, the court dismissed the attachment in this case because it was issued before a petition in the action was filed;[4] and in another case, because the plaintiff filed a declaration on the common counts in assumpsit, instead of a petition stating the facts on which the plaintiff relied as constituting his cause of action.[5] And under a statute which required "that the plaintiff, his agent, or attorney, shall make affidavit that the defendant is justly indebted to the plaintiff, and the amount of the demand," an attachment was dissolved, because neither in the affidavit nor in the petition was the amount of the defendant's indebtedness stated in terms, but could only be arrived at by a calculation founded upon the statements of the petition of the amount of the note sued on and the credits indorsed on it.[6] Under the same statute, there was the same result where, in a suit on a promissory note, the peti-

[1] Grover *v.* Buck, 34 Michigan, 519.
[2] Bowen *v.* Slocum, 17 Wisconsin, 181.
[3] Trowbridge *v.* Sickler, 42 Wisc. 417.
[4] Wooster *v.* McGee, 1 Texas, 17.
[5] Caldwell *v.* Haley, 3 Texas, 317.
[6] Marshall *v.* Alley, 25 Texas, 342.

tion admitted a payment of a certain amount, but the date of the payment was not stated.[1] And so, where the affidavit omitted the word *justly* in stating the defendant's indebtedness.[2] And so, where the affidavit omitted the word "is" before the words "justly indebted."[3] And so, where there were two defendants, and the law required affidavit that the attachment was not sued out for the purpose of injuring or harassing the defendants, and the affidavit said "the defendant." The court said: "We are not permitted to resort to presumptions as to what the affiant intended to swear, but must be governed by what he has sworn, as shown by the language employed. There were two defendants. Before the plaintiffs were entitled to an attachment they were required to make oath that it was not sued out for the purpose of injuring or harassing either of them. Might not the affiant have sworn as he has sworn with a good conscience, although it was his purpose to injure or harass the one and not the other?"[4]

§ 103 *a a*. Where a statute gives an attachment on affidavit that the defendant has done a certain act *with a certain intent*, an affidavit is vicious which alleges the act, but omits to aver the specified intent. Thus, under a statute authorizing an attachment "where the debtor has departed from this State, with the intention of having his effects removed from this State;" an affidavit that he "has departed from this State and beyond the reach of his creditors," was held bad, because it failed to show the intention specified in the statute, and was not its equivalent.[5]

§ 103 *b*. If the statute authorize an attachment on affidavit that the defendant has done a certain act, *attended with a specified result*, it is not enough to aver merely that he has done the act, but the specified result must also be averred. Thus, where the ground of attachment was, that "the defendant is about to remove his property out of the State, and that thereby the plaintiff will probably lose the debt, or have to sue for it in another State;" and the affidavit set forth as the consequence of the alleged anticipated removal of the goods of the defendant, that "the ordinary process of law cannot be served on him," it was held bad.[6] So, under a statute authorizing attachment "when any person shall be an inhabitant of any State, territory, or

[1] Espey *v.* Heidenheimer, 58 Tex. 662.
[2] Evans *v.* Tucker, 59 Texas, 249.
[3] City Nat. Bank *v.* Flippen, 66 Texas, 610.
[4] Perrill *v.* Kaufman, 72 Texas, 214; Gunst *v.* Pelham, 74 Ibid. 586.
[5] Crayne *v.* Wells, 2 Bradwell, 574.
[6] Napper *v* Noland, 9 Porter, 218.

country, without the limits of this State, so that he cannot be personally served with process," an affidavit was held bad, which averred the inhabitancy in another State, but omitted the averment as to the impossibility of personal service of process.[1] So, an affidavit that the defendant "was removing out of the county privately," does not comply with a statute using the words "is removing out of the county privately, or absconds or conceals himself, so that the ordinary process of law cannot be served upon him."[2]

§ 104. Uncertainty in the affidavit will vitiate it. Thus, where the law required the affidavit to show that the cause of action was founded on contract, and the plaintiff did not swear positively to a contract, but stated facts, from which perhaps a jury might infer a contract, and perhaps not; the affidavit was held insufficient.[3] And where an affidavit stated that the defendant "is justly indebted to plaintiff (in a specified sum) for services rendered and to be rendered by deponent, as clerk, part due, and a part of said sum not due;" it was considered defective, for uncertainty as to what was in fact due.[4] So, an affidavit in the following terms was ruled out for uncertainty: "A., plaintiff, states that B., the defendant, is *bona fide* indebted to him in the sum of $2,053.37 over and above all discounts; and the said A., at the same time, produces the account current which is hereunto annexed, by which the said B. is so indebted; and the said A. likewise states that he hath drawn on the said B. for the sum of $1,500, and also for the sum of $2,223.10, which drafts, though not due, the said A. understands from the said B. and verily believes will not be paid, and further, that the latter draft for $2,223.10 hath never been accepted by the said B., and the said A. hath therefore allowed no credit or discount for said drafts. He further states that B. informed him some time ago, that he would be entitled to charge against said A.'s account, for some loss that he expected would accrue in the sale of certain flour on their joint account; no account has been exhibited stating the amount of such loss, and therefore he hath allowed said B., in stating his account, no credit."[5] So, under

[1] Thompson *v.* Chambers, 12 Smedes & Marshall, 488.

[2] Poage *v.* Poage, 3 Dana, 579.

[3] Jacoby *v.* Gogell, 5 Sergeant & Rawle, 450; Quarles *v.* Robinson, 1 Chandler, 29; 2 Pinney, 97. See Robinson *v.* Burton, 5 Kansas, 293.

[4] Friedlander *v.* Myers, 2 Louisiana, Annual, 920. See Espey *v.* Heidenheimer, 58 Texas, 662.

[5] Munroe *v.* Cocke, 2 Cranch, C. C. 465.

a statute authorizing an attachment where the debtor "is about fraudulently to remove, convey, or dispose of his property or effects, so as to hinder or delay his creditors," an affidavit was held vicious for uncertainty, which averred that the plaintiff "has good reason to believe, and does believe, that the defendant is about fraudulently to remove his property, convey or dispose of the same, so as to hinder or delay this deponent."[1] So, an affidavit by a plaintiff's attorney that "to the best of his knowledge and belief" the indebtedness exists, and that the debtor resides out of this State, was held to be ambiguous and bad; for the phrase "to the best of his knowledge and belief" might qualify both propositions.[2]

§ 104 *a*. The leaving of a blank in the part of an affidavit which was intended to state the ground of attachment, so that thereby the fact is not alleged, — as, for instance, where the affidavit reads, "and the said . . . resides without the limits of this State," — is fatal to the attachment.[3] But the omission of a word, which is manifestly a clerical mistake, and can be well supplied in construction, does not vitiate the affidavit; as, where, in alleging the defendant's indebtedness, the word "is" was omitted before the word "indebted," it was held that without that word the affidavit obviously meant to affirm indebtedness.[4]

§ 105. Surplusage in an affidavit, not inconsistent with the substantial averment required by statute, will not vitiate it. Thus, where the person making the affidavit stated sundry acts of the defendant, and closed with these words: "Affiant further saith he believes the facts above stated are true, and that said defendant is, by the means above stated, concealing his effects so that the claims aforesaid will be defeated at the ordinary course of law;" which averment was in compliance with the law; it was held, that the previous unnecessary statements did not vitiate the affidavit.[5] So, where the affidavit stated that "the defendant resided out of the State of Louisiana, having acquired no legal residence in the State;" it was held that the statement of the reason for considering him a non-resident did

[1] Merrill *v.* Low, 1 Pinney, 221.

[2] Neal *v.* Gordon, 60 Georgia, 112; Krutina *v.* Culpepper, 75 Ibid. 602.

[3] Black *v.* Scanlon, 48 Georgia, 12.

[4] Buchanan *v.* Sterling, 63 Georgia, 227. See Foran *v.* Johnson, 58 Maryland, 144.

[5] Spear *v.* King, 6 Smedes & Marshall, 276. See Van Kirk *v.* Wilds, 11 Barbour, 520; Edwards *v.* Flatboat Blacksmith, 33 Mississippi, 190; Auter *v.* Steamboat J. Jacobs, 34 Ibid. 269.

not vitiate it.[1] But if the surplusage be of such character as substantially to impair the main allegation of the affidavit, the whole will thereby be vitiated.[2]

§ 106. All the elements of positiveness, knowledge, information, or belief, conjointly or separately, required by statute, should appear in the affidavit, or be substantially included in its terms, or it will be bad. Thus, if a fact is required to be sworn to in direct terms, the law is not complied with by a party's swearing that he is "informed and believes,"[3] or that he verily believes,[4] or that he "has reason to apprehend and does apprehend and believe"[5] the fact to exist. And under a statute authorizing an attachment "where there is good reason to believe" the existence of a particular fact, an affidavit that "it is the plaintiff's belief" that the fact existed, was held insufficient: he should have stated that he had good reason to believe and did believe it.[6] Under a law requiring the party to swear that a certain fact did not exist "within his knowledge or belief," an affidavit was held bad, which failed to state the want of his belief.[7] And so, where the party was required to swear "to the best of his knowledge and belief," and he swore only to the best of his belief.[8] And so, where he was required to swear that he "verily believes," and he swore "to the best of his knowledge and belief."[9] And so, where he was required to swear that he "believes the plaintiff ought to recover," and he swore that "he thinks" he ought to recover.[10]

But where the affiant was required to state that the facts are within his personal knowledge, or that he is informed and believes them to be true, a positive oath of the facts was held sufficient, though he did not add that he had personal knowledge of them, or believed them to be true; it being considered that the positive oath implied both.[11] And so, under a statute requiring an affidavit "showing" the existence of a certain fact, it was

[1] Farley *v.* Farior, 6 Louisiana Annual, 725.

[2] Emmett *v.* Yeigh, 12 Ohio State, 335; Streissguth *v.* Reigelman, 75 Wis. 212.

[3] Deupree *v.* Eisenach, 9 Georgia, 598; *Ex parte* Haynes, 18 Wendell, 611; Cadwell *v.* Colgate, 7 Barbour, 253; Dyer *v.* Flint, 21 Illinois, 80; Archer *v.* Claflin, 31 Ibid. 306; Williams *v.* Martin, 1 Metcalfe (Ky.), 42; Wilson *v.* Arnold, 5 Michigan, 98; Ross *v.* Steen, 20 Florida, 443; Clowser *v.* Hall, 80 Virginia, 864.

[4] Greene *v.* Tripp, 11 Rhode Island, 424.

[5] Brown *v.* Crenshaw, 5 Baxter, 584.

[6] Stevenson *v.* Robbins, 5 Missouri, 18; Hunt *v.* Strew, 39 Michigan, 368.

[7] Cobb *v.* Force, 6 Alabama, 468.

[8] Bergh *v.* Jayne, 7 Martin, N. s. 609.

[9] Stadler *v.* Parmlee, 10 Iowa, 23.

[10] Rittenhouse *v.* Harman, 7 West Virginia, 380.

[11] Jones *v.* Leake, 11 Smedes & Marshall, 591.

held, that an affidavit of such fact, as the affiant "verily believed," was good; which was, in effect, to decide that the party's belief was a sufficient "showing" to fill the terms of the statute.[1] Under such a statute it is not necessary, in setting forth the ground of the attachment, to use the very words of the statute, provided the affidavit contain language fully equivalent, or clearly "showing" the ground specified or intended. The statute prescribes the *fact* which is to be shown, not the words in which the "showing" is to be made.[2]

Under a statute requiring an affidavit "showing," among other things, "the amount which the affiant believes the plaintiff ought to recover," an affidavit stating positively that a certain sum was due from the defendant to the plaintiff, was considered to comply substantially with the statute, though there was no allegation of the affiant's belief that the plaintiff ought to recover.[3]

§ 106 *a*. The strictness with which compliance with the law in the framing of the affidavit may be exacted, was illustrated in a case in Texas, under a statute requiring that the affidavit, after setting forth the ground of attachment, should "further state that the attachment is not sued out for the purpose of injuring *or* harassing the defendant." An attachment was quashed because the affidavit said "this attachment is not sued out for the purpose of injuring *and* harassing the said defendant." The appellate court sustained the action of the court below, on the ground that the language of the statute embodied two distinct requirements: *first*, that the plaintiff should swear that his purpose was not to injure the defendant, in the sense of inducing a damage, loss, or detriment to him; and *second*, that he should swear that his purpose was not to harass, "that is, weary, jade, tire, perplex, distress, tease, vex, molest, trouble, disturb, the defendant." Said the court: "Such being, as we conceive, the meaning of the statute, to comply with its requirement the affidavit must show that the attachment was not sued out for the purpose of either injuring the defendant or of harassing him. The affidavit in question was that the writ was not sued out for both the one and the other purpose. It does not follow the language of the statute, nor are the statements in it equivalent to what is required. It is not inconsistent with the facts stated, namely, that 'this attachment is not sued out for the purpose of injuring *and* harassing the said defendants,' that the plaintiff

[1] Trew *v.* Gaskill, 10 Indiana, 265; McNamara *v.* Ellis, 14 Ibid. 516.

[2] Creasser *v.* Young, 31 Ohio State, 57.

[3] Sleet *v.* Williams, 21 Ohio State, 82.

had the purpose of doing the one or else the other. Perjury in having falsely stated that the purpose was to do either of those two things could not be assigned upon such an affidavit."[1]

§ 107. While it is in all cases advisable to follow strictly the language of the statute, yet if the words of the affidavit are in substantial compliance with the terms of, or necessarily and properly imply the case provided for by, the statute, it will be sufficient.[2] The jurisdictional fact need only to be set forth with substantial accuracy, without negativing every possible conclusion to the contrary.[3] Thus, where the law authorized an attachment, when the debtor "is about to convey, assign, remove, or dispose of any of his property or effects, so as to defraud, hinder, or delay his creditors;" an affidavit alleging that the defendant was "about to convey his property so as to hinder or delay his creditors," was held equivalent to alleging fraud, and that therefore it was not necessary to use the word "defraud."[4] Where the cause for which an attachment might issue was, that "he resides out of this State," an affidavit that the defendant "is a non-resident," was considered sufficient.[5] Where the statute authorized an attachment upon an affidavit that the defendant is a "non-resident," an affidavit that he "is not now an inhabitant of this State" was sustained.[6] Where the language of the statute was, "that the debtor *so absconds* that the ordinary process of law cannot be served on him," an affidavit that the debtor "*hath absconded* so that the ordinary process of law cannot be served on him," was considered to comply substantially with the law.[7] An affidavit that the defendant "is about removing," was decided to be in conformity to the statute which provided for an attachment where the debtor "is removing."[8] Where the statute gave an attachment when the debtor "is removing or about to remove himself or his property beyond the limits of the State;" and suit was brought against the owner and master of a steamboat, alleging that he was "about to remove the said steamboat beyond the limits of this State;" it was considered that, however defective the allegation might be, in stating the defendant to be about to remove only a single piece of property, yet that it was equivalent to stating that he was

[1] Moody *v.* Levy, 58 Texas, 532.
[2] Van Kirk *v.* Wilds, 11 Barbour, 520.
[3] Franklin *v.* Claflin, 49 Maryland, 24.
[4] Curtis *v.* Settle, 7 Missouri, 452.
[5] Graham *v* Ruff, 8 Alabama, 171.
[6] Wiltse *v.* Stearns, 13 Iowa, 282.
[7] Wallis *v.* Wallace, 6 Howard (Mi.), 254.
[8] Lee *v.* Peters, 1 Smedes & Marshall, 503.

about to remove *himself*, since, as he was master of the boat, if he removed the boat, his relation to her necessarily involved his own removal.[1] Where the statute required the affidavit to state "that the defendant is about to remove himself and his effects so that the claim of the plaintiff will be defeated," a statement "that the defendant will remove himself and his effects beyond the limits of the State, before the plaintiff's claim could be collected by the ordinary course of law, and that he is transferring and conveying away his property, so that the claim of the plaintiff will be defeated, or cannot be made by the regular course of law," was held to be a substantial compliance with the law.[2] Where an affidavit stated that "A., B., and C., merchants and partners, trading and using the name and style of A. & Co., are justly indebted to the plaintiff in the sum of $5,460, and that the said A. & Co. reside out of this State;" and a motion was made to dismiss the attachment, because the affidavit did not state that the individuals constituting the firm of A. & Co. resided out of the State; the affidavit was held sufficiently certain, because when a partnership is spoken of by its partnership name, and said to reside or not to reside in a particular place, the meaning is presumed to be, that the members composing the partnership reside or do not reside in that place.[3] Where the statute required an oath that "the defendant is about to remove from the State, so that the ordinary process of law cannot be served on him," an affidavit that he is "about to abscond himself and his property out of the State, so that the process of law cannot be served on him," was considered as equivalent to the assertion that he is about to remove himself and property out of the State privately, and as substantially within the requirement of the statute.[4] Where the statute required the affidavit to state "the amount of the sum *due*," and the plaintiff swore that the defendant was "really indebted" to him in a certain sum, it was held, that the expression conveyed the idea of a debt actually *due* and payable, and was sufficient.[5] Where, in enumerating

[1] Runyan *v.* Morgan, 7 Humphreys, 210.

[2] Dandridge *v.* Stevens, 12 Smedes & Marshall, 723.

[3] Chambers *v.* Sloan, 19 Georgia, 84.

[4] Ware *v.* Todd, 1 Alabama, 199.

[5] Parmele *v.* Johnston, 15 Louisiana, 429. Where the law required the affidavit to state "that the defendant is indebted to the plaintiff, and specifying the amount of such indebtedness, as near as may be, over and above all legal offsets, and that the same is due upon contract, express or implied, or upon judgment;" the Supreme Court of Michigan held, that the words *is due* refer not only to the existence of the indebtedness, but to its being due and payable at the time the affidavit is made. Cross *v.* McMaken, 17 Michigan, 511; Mathews *v.* Densmore, 43 Ibid. 461.

the cases in which an attachment would lie, one was "when the debtor is about leaving permanently the State," and in a subsequent part of the same statute, in relation to the affidavit, the party was required to swear that "the debtor is on the eve of leaving the State forever;" it was held, that the latter requirement was fulfilled by an affidavit declaring that "the defendant was about leaving the State permanently."[1] Under a statute giving attachment "when a debtor is concealing or about removing his effects so that the claim of a creditor will be defeated," an affidavit that a debtor "is about removing from the State, or is so concealing his effects as to defeat the creditor's claim," was held sufficient.[2] Under a statute authorizing an attachment where the debtor "is about to remove his goods out of this State," an affidavit stating that the defendant "had removed part, and was about to remove the remainder of his goods and effects from this State," was considered as complying with the law.[3] Where an attachment might issue when "any person hath removed, or is removing himself out of the county privately, or so absconds or conceals himself that the ordinary process of law cannot be served on him," an affidavit that the defendant "was removing himself out of the county privately," was held sufficient, without the addition of the words "so that the ordinary process of law cannot be served."[4] Under a statute using the phrase "absconding or concealing himself or his property or effects," an affidavit that the defendant "is concealing his property and effects," was adjudged sufficient.[5] An allegation that the defendant "is absconding," was held to be sufficient under an act using the words "he absconds;" and an allegation "that they are removing their property to be removed beyond the limits of the State," was considered substantially equivalent to an allegation that they are causing their property to be removed beyond the limits of the State.[6] Where the statute authorized an attachment when a debtor "has converted or is about to convert his property into money or evidences of debt with intent to place it beyond the reach of his creditors," an affidavit that "the defendant had already disposed of and assigned the notes attached, by pledging them for advances, and that she will further assign said notes and convert them into money with the intent to

[1] Sawyer v. Arnold, 1 Louisiana Annual, 315.

[2] Commercial Bank v. Ullman, 10 Smedes & Marshall, 411.

[3] Mandel v. Peet, 18 Arkansas, 236.

[4] Bank of Alabama v. Berry, 2 Humphreys, 443.

[5] Boyd v. Buckingham, 10 Humphreys, 434.

[6] Kennon v. Evans, 36 Georgia, 89.

place them beyond the reach of the petitioner, who is creditor," was considered a substantial compliance with the law.[1] Under a statute authorizing an attachment "when the debtor is about fraudulently to dispose of his property," an affidavit which substituted "effects"[2] or "goods"[3] for "property" was deemed sufficient.

§ 107 *a*. If the literal following of the words of the statute would make an affidavit upon which perjury could not be assigned, the affidavit is bad. Thus, where the law authorized the issue of an attachment upon affidavit that the defendant "has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal *any* of his property with intent to defraud his creditors," and the affidavit was in the precise words of the law, it was considered bad.[4] So where the affidavit alleged that the defendant "has disposed of his property, or any part thereof."[5]

§ 108. Numerous cases of insufficient affidavits are reported. It is not without advantage to present them here. In doing so, as will be seen, no attempt is made at systematic arrangement, but they are given in the order they were met with. Under a statute authorizing attachment, where "the debtor is removing out of the county privately," an affidavit that he "intends to remove" is not sufficient.[6] So, where an attachment was authorized when the debtor "absconds," and the affidavit was that he "has absconded."[7] So, where the ground of attachment was "that any person hath removed, or is removing himself out of the county privately;" and the affidavit said that the defendant "is about to remove himself out of the county, so that the ordinary process of law cannot be served upon him."[8] So, where the statute gave an attachment when "the debtor is not resident in the State," and the affiadvit was that the defendant "is not at this time within the State."[9] So, an affidavit "that the defendant has left the State never to return," does not comply with a statute requiring an averment that he is "about to remove his property out of the State."[10] A statute authorized an attach-

[1] Frere *v.* Perret, 25 Louisiana Annual, 500.

[2] Free *v.* Hukill, 44 Alabama, 197.

[3] Hafley *v.* Patterson, 47 Alabama, 271.

[4] Miller *v.* Munson, 34 Wisconsin, 579. See Moody *v.* Levy, 58 Texas, 532.

[5] Goodyear Rubber Co. *v.* Knapp, 61 Wisconsin, 103.

[6] Mantz *v.* Hendley, 2 Hening & Munford, 308.

[7] Levy *v.* Millman, 7 Georgia, 167; Brown *v.* McCluskey, 26 Ibid. 577.

[8] Wallis *v.* Murphy, 2 Stewart, 15.

[9] Croxall *v.* Hutchings, 7 Halsted, 84.

[10] Millaudon *v.* Foucher, 8 Louisiana, 582.

ment upon an affidavit that "the debtor is either on the eve of leaving the State permanently, that he has left it never again to return, that he resides out of the State, or that he conceals himself in order to avoid being cited." An affidavit that the defendant "attempted to depart from the State permanently, and that he concealed himself so as to avoid being cited to appear and answer the demand of the plaintiff, and that he is about to remove his property out of the State," was considered insufficient; because, in regard to the departure and concealment, it referred indefinitely to the past, making no allusion either to the present or future, and was too vague to form the legal foundation of an attachment.[1] Under a statute authorizing an attachment where the defendant "has departed from the State with intent to defraud his creditors, and to avoid the service of a summons," an affidavit that "the defendant is absent, so that the ordinary process of law cannot be served on him," was held fatally defective.[2] Under a statute authorizing an attachment, where the debtor "hath removed himself out of the county privately, so that the ordinary process of law cannot be served on him," an affidavit alleging the removal, but omitting the word "privately," was held bad.[3] A affidavit that the defendant "is about to abscond," was decided not to comply with a statute authorizing an attachment where the debtor "absconds or conceals himself;" or with one using the terms, "shall be absconding or concealing himself;"[4] or with one using the phrase "hath absconded."[5] Where attachment was authorized when the debtor "is removing out of the county privately," an affidavit that he "hath removed," is bad.[6] Under a statute using the words "is privately removing out of the county, or absconds and conceals himself, so that the ordinary process of law cannot be served upon him," an affidavit that the defendant had "either left the county and commonwealth, or so absconds himself that the ordinary process of law cannot be served upon him," was held insufficient.[7] Where the statute required the affidavit to state that the defendant "had not resided in the State for three months immediately preceding the time of making application for the attachment," and the affidavit was that he "had not resided there for three months immediately preceding the date of

[1] New Orleans v Garland, 11 Louisiana Annual, 438.

[2] Love v. Young, 69 North Carolina, 65.

[3] McCulloch v. Foster, 4 Yerger, 162.

[4] Bennett v. Avant, 2 Sneed, 152.

[5] Lewis v. Butler, Kentucky Decisions (Sneed) 290.

[6] Hopkins v. Suttles, Hardin, 95, note.

[7] Davis v. Edwards, Hardin, 342.

the affidavit," and the affidavit was dated two days before the attachment was applied for, it was held insufficient.[1] In a proceeding against several defendants as non-residents, an affidavit stating that "they are not all residents" of the State in which the writ is sought, is indefinite and insufficient, as clearly implying that some of them do reside there.[2] Where the statutory ground of attachment was, that the defendant "is not a resident of or residing within this State," an affidavit that he "is not a resident of this State, so that the process of this court cannot be served upon him," was held insufficient.[3] Under the same statute, an affidavit that the defendant "is not a resident of this State," was held bad.[4] Where the statute authorized an attachment where "a debtor is on the eve of leaving the State forever," an affidavit that the affiant "verily believes and has just grounds to apprehend that the defendant may depart from the State permanently," is insufficient.[5] Under a statute requiring an affidavit that the defendant "is removing out of the district privately, or absconds or conceals himself, so that the ordinary process of law cannot be served upon him," an affidavit that he "is removing or is about to remove out of said district, so that the ordinary process of law cannot be served upon him," was held bad.[6] Under a statute giving an attachment when the debtor "is about fraudulently to dispose of his property," an allegation that the plaintiff "has reasons to believe, and does believe, that the defendant will convey and dispose of his groceries and his articles in his said grocery, in order to defraud his creditors," was considered insufficient.[7] And so, under the same statute, where the allegation was "that the defendants, in conveying their property, will endeavor to defeat the collection of complainant's debt; that they have avoided, and, as complainant believes, they intend, by future and fraudulent conveyances and transfers, to evade and avoid payment of his said debt."[8]

§ 108 *a*. In probably every State where an affidavit setting forth grounds of attachment is required, the writ is authorized where a debtor is "about" to do some particular act. The meaning attributable to "about," in that connection, was discussed by the Supreme Court of Mississippi, which said: "What

[1] Drew *v.* Dequindre, 2 Douglas, 93.
[2] Powers *v.* Hurst, 3 Blackford, 229.
[3] Lane *v.* Fellows, 1 Missouri, 251.
[4] Alexander *v.* Haden, 2 Missouri, 187.
[5] Reding *v.* Ridge, 14 La. Ann. 36.
[6] Allen *v.* Fleming, 14 Richardson, 196.
[7] Jackson *v.* Burke, 4 Heiskell, 610.
[8] McHaney *v.* Cawthorn, 4 Heiskell, 508.

is the meaning of the terms 'about to remove?' 'About,' — does that imply the next hour, or day, or week, or month? Does the statute convey the idea that necessarily the act must be done within any definite space of time? The implication is quite strong that the 'removal' will shortly occur, but no more definiteness and precision is set forth than the word 'about' imports. Among the definitions or senses in which the word is used, given by lexicographers, are 'near to,' 'in performance of some act,' 'concerned in,' 'engaged in.' It is an ordinary word of no artificial or technical signification, and should receive the rendering which is given to it in common parlance. If the debtor is engaged in the act, or is near to the performance of the act of removal, if he entertains the purpose and is making preparations to carry it out, then the creditor is entitled to the writ. It would be hurtful in practice to attempt to declare precisely what is implied in the terms 'about to remove.' For experience would show that many meritorious cases would fall within the intendment of the remedy, which might be excluded by a rule laid down in advance. We think it wiser and safer in the administration of practical justice, to leave each case, as it arises, to be governed by its own special facts." Influenced by these views the court held it error to refuse an instruction, "that the jury may infer the purpose to remove, at the date of the attachment, from the previous expressions of such design, and the acts of the debtor; and it is not necessary that the defendant purposed immediate removal, if the evidence showed that the design existed, and his actions purposed to carry that design into execution, at some short time thereafter, and as soon as he had prepared his affairs for removal, and without paying his debts."[1] The views thus expressed were substantially adopted in Missouri.[2]

This subject was viewed differently by the Supreme Court of Tennessee, under a statute authorizing an attachment when the debtor is "about fraudulently to dispose of his property;" and the allegation was that the plaintiff "has reasons to believe, and does believe, that the defendant will convey and dispose of his groceries and his articles in his said grocery, in order to defraud his creditors." This allegation was considered not to comply with the law, and the court thus expressed itself: "These words '*about* fraudulently to dispose of his property,' import an exigency by which the creditor's debt is in peril of immediate loss

[1] Myers v. Farrell, 47 Mississippi, 281. [2] Elliott v. Keith, 32 Missouri Appeal, 579.

unless this extraordinary remedy is allowed to him. Not an act which may peradventure be done at some future time, but a fraudulent act on the very eve of consummation. The mere opinion of the complainant that the defendant will do a fraudulent act does not import that he is about to do it, or that the act is about to be done, but that it will be done at some future and indefinite day. The law requires the allegation of an act, not an intent, — an act which, though not yet consummated, is presently to be done. . . . The word 'about,' in the sense of the attachment laws, must be taken in its common acceptation as defined by lexicographers, 'near to in action, or near to in the performance of some act.' We hold that to authorize an attachment on the ground that the defendant is about fraudulently to dispose of his property, the charge in the affidavit, if not in the words of the statute, must import that the defendant is on the eve of such fraudulent disposition of his property; and we are of opinion that the charge that the defendant *will* dispose of his property in order to defraud his creditors, is not sufficient to authorize the issuance of an attachment." [1]

§ 109. The fact that *two* affidavits of the same import appear in the record, will not invalidate the attachment. The second will be disregarded.[2] But where each of two attorneys made an affidavit, one as to the debt sued on, the other as to the statutory ground for suing out the attachment, and the two combined made out a clear case for the writ, neither was disregarded; but the court, sustaining both, decided it to be unnecessary that every fact should be sworn to by the same person and appear in the same affidavit.[3]

§ 110. An affidavit cannot be made by a partnership firm in its partnership name. Thus, in an action by the firm of H. & H., a paper signed and purporting to have been sworn to by H. & H., was held to be no affidavit; it not being the oath of either member of the firm, and the firm, as such, being incapable of taking a corporal oath.[4]

§ 111. The affidavit should be made as near as practicable at the time of the institution of the suit; but it is believed to be a general practice to allow attachments to issue on affidavits made

[1] Jackson *v.* Burke, 4 Heiskell, 610.
[2] Wharton *v.* Conger, 9 Smedes & Marshall, 510.
[3] Lewis *v.* Stewart, 62 Texas, 352.
[4] Norman *v.* Horn, 36 Missouri Appeal, 419.

some time before the issue of the writ. In South Carolina, where the law required the affidavit to be made at the time of filing the declaration, it was decided, that so constant and uniform had been the practice to the contrary, that it ought not to be contested or varied. "It will be seen at once," said the court, "that unless a party is present to make the affidavit at the filing of the declaration, a foreigner, or even one of our own countrymen, who should accidentally be absent from the State, might be deprived of the advantage accruing under the attachment act."[1] And in Missouri it was held, that the lapse of nine or ten days between the date of the affidavit and the issue of the writ would not sustain a motion to quash. The affidavit alleged the non-residence of the defendant, and it was urged that the fact, though true when sworn to, may have ceased to be so when the writ was obtained; but the court said, that if such were the case, it should be taken advantage of by plea in abatement, which would put in issue the truth of the affidavit at the time the writ issued.[2] And in Kansas, where the ground of attachment was that the defendants had fraudulently contracted the debt sued on, a delay of eighteen days in issuing the attachment after that on which the affidavit was made, was held admissible, since the ground was one which having once occurred was not a matter subject to change, and therefore must have been as true when the writ issued as when the affidavit was made.[3]

In Illinois it was held, that the affidavit need not be filed at the time it was made, but may be within a reasonable time thereafter, and what is a reasonable time must depend on the circumstances of each case. Said the court: "Where the person making the affidavit resides in the county in which the suit is brought, less time would be reasonable than where he resided in a different county; and in the latter case less than where he resided in a different State. In such case a reasonable time should be allowed within which to transmit the affidavit to the place where it is to be used." In this case the plaintiff resided in the county in which the suit was brought, and allowed eleven days to elapse after making the affidavit before he filed it; and the court held the time unreasonable.[4] If in any case there be

[1] Creagh v. Delane, 1 Nott & McCord, 189; Wright v. Ragland, 18 Texas, 289.

[2] Graham v. Bradbury, 7 Missouri, 281. See O'Neil v. N. Y. & S. P. Mining Co., 1 Nevada, 141; Campbell v. Wilson, 6 Texas, 379; Wright v. Ragland, 18 Ibid. 289; Lewis v. Stewart, 62 Ibid. 352.

[3] Adams v. Lockwood, 30 Kansas, 373.

[4] Foster v. Illinski, 3 Bradwell, 345.

such delay as fairly to induce the presumption that the process of the court is abused, or used oppressively, or that the ground of attachment may not exist when the writ is sued out, the whole proceeding may, on motion, be set aside. Unless, however, there are these strong features to warrant this peremptory disposition of the writ, the resort should be to a plea in abatement.[1] In Michigan, however, under an act requiring the affidavit to state that the defendant "does not reside in this State, and has not resided therein for three months *immediately preceding the time of making application for such attachment*," it was held, that an affidavit made the day before the attachment issued was bad;[2] and so of an affidavit under an act which used in that connection the words "immediately preceding the time of *making such affidavit*."[3] Under each act it was decided that the affidavit must be made on the day that the attachment issues.

§ 112. The mode of defeating an attachment on account of defects in, or the omission to make, an affidavit, varies in different States. The most usual mode is by motion to quash or dissolve the attachment. This motion is in the nature of a plea in abatement, and, if successful, its effect is the same.[4] In Alabama and North Carolina, however, the only way to reach such defects is by that plea.[5] Whichever mode is adopted, it should be resorted to *in limine;* for after appearance by the defendant and plea to the action, it is too late to take advantage of defects in the preliminary proceedings; they will be considered as waived, unless peculiar statutory provisions direct otherwise.[6] And if the defendant give a bail bond for the payment of whatever judg-

[1] McClanahan *v.* Brack, 46 Mississippi, 246; Campbell *v.* Wilson, 6 Texas, 379; Wright *v.* Ragland, 18 Ibid. 289.

[2] Drew *v.* Dequindre, 2 Douglas, 93.

[3] Wilson *v.* Arnold, 5 Michigan, 93; Fessenden *v.* Hill, 6 Ibid. 242.

[4] Watson *v.* McAllister, 7 Martin, 368.

[5] Lowry *v.* Stowe, 7 Porter, 483; Jones *v.* Pope, 6 Alabama, 154; Burt *v.* Parish, 9 Ibid. 211: Kirkman *v.* Patton, 19 Ibid. 32; Garmon *v.* Barringer, 2 Devereux & Battle, 502.

[6] Garmon *v.* Barringer, 2 Devereux & Battle, 502; Stoney *v.* McNeill, Harper, 156; Watson *v.* McAllister, 7 Martin, 368; Enders *v.* Steamer Henry Clay, 8 Robinson (La.), 30; Symons *v.* Northern, 4 Jones, 241; Burt *v.* Parish, 9 Alabama, 211; Bishop *v.* Fennerty, 46 Mississippi, 570; Woodruff *v.* Sanders, 18 Wisconsin, 161; Blackwood *v.* Jones, 27 Ibid. 498; Fairfield *v.* Madison Man. Co., 38 Ibid. 346; McDonald *v.* Fist, 60 Missouri, 172; Landfair *v.* Lowman, 50 Arkansas, 446; Manhard *v.* Schott, 37 Michigan, 234: Austin *v.* Burroughs, 62 Ibid. 181. But in Kentucky the Court of Appeals held, that a motion to discharge the attachment was well made during the progress of the trial, and after most of the testimony had been given to the jury, and remarked, "We do not see how a motion of this sort could well come too late, as the court, even upon final decision, should vacate the attachment if it were improperly issued." Taylor *v.* Smith, 17 B. Monroe, 536.

ment the plaintiff may recover, he cannot thereafter plead in abatement the insufficiency or illegality of the affidavit.[1] But a defendant's appearance, by attorney, to move for the dismissal of an attachment, and to except to the jurisdiction of the court, is not such an appearance as may be construed into a submission to the jurisdiction.[2] If, however, with the appearance for the purpose of making that motion, the defendant combine a motion to review and set aside the judgment because it was rendered upon insufficient evidence, that goes to the merits of the action, and is a full submission to the jurisdiction, and a waiver of all objections to the process.[3] And so if the defendant appear, and have the case put at the foot of the docket.[4] And if a defendant appear, and deny the allegations of a defective affidavit, and treat it as if it were legal in its terms, and go into a trial of the issue so made, and thereby get all the benefit that he could have had if the affidavit had been in strict conformity to law, and the result of the trial be adverse to him, he cannot obtain a reversal of the judgment because of the defect in the affidavit.[5]

In reference to the matter of the defendant's appearance to an attachment suit, this case occurred in Illinois. Suit by attachment was brought against a foreign steamship company, as a corporation, and service was had on the company's agent, and garnishees were summoned. The company appeared by counsel, and pleaded *nul tiel corporation*. Thereafter the plaintiff had leave to amend, and did amend his declaration, by inserting the names of certain individuals, as partners doing business under the name by which the corporation was sued; and against them he took an *alias* summons and writ of attachment. No service of the summons was had, but under the attachment the original garnishees were summoned again. No new affidavit was filed, showing the indebtedness and non-residence of the substituted defendants, nor did they appear after the amendment, and judgment *in personam* was taken against them, on which they sued out a writ of error. In the appellate court it was contended

[1] *Post* § 318; Hill *v.* Harding, 93 Illinois, 77. See Barry *v.* Foyles, 1 Peters, 311; Huff *v.* Hutchinson, 14 Howard Sup. Ct. 586; Payne *v.* Snell, 3 Missouri, 409; Dierolf *v.* Winterfield, 24 Wisconsin, 143.

[2] Bonner *v.* Brown, 10 Louisiana Annual, 334; Johnson *v.* Buell, 26 Illinois, 66; Blackwood *v.* Jones, 27 Wisconsin, 498; Crary *v.* Barber, 1 Colorado, 172; Graham *v* Spencer, 14 Federal Reporter, 603; Harkness *v.* Hyde, 98 U. S. 476; Wynn *v.* Wyatt, 11 Leigh, 584; Petty *v.* The Frick Co., 86 Virginia, 501. *Sed contra*, Whiting *v.* Budd, 5 Missouri, 443; Evans *v.* King, 7 Ibid. 411.

[3] Anderson *v.* Coburn, 27 Wisconsin, 558.

[4] Orear *v* Clough, 52 Missouri, 55.

[5] Ryon *v.* Bean, 2 Metcalfe (Ky.), 137.

that the appearance of the defendants to the action in its original shape conferred jurisdiction, and authorized a personal judgment against them; but this position was overruled; the court holding that the appearance to the action, as against the corporation, could not be considered an appearance after the amendment; and the judgment was reversed.[1]

§ 113. As we have seen, a defective affidavit cannot be amended unless the law expressly authorize it;[2] but where it does authorize it, such an affidavit is not void, but only voidable by a direct proceeding to have it set aside or quashed. If it contain the names of the parties, and specifies the amount of the indebtedness, and avers a statutory ground for issuing the writ, however defectively any of those points may be stated, it may be amended. But if it in no way refers to the parties, or fails to fix any amount of indebtedness, or to state any statutory ground for suing out the writ, it is not amendable, but void.[3]

In some States the quashing or setting aside of an attachment for defect in the affidavit is prohibited, if a sufficient affidavit be filed. In such case it is error to quash the proceedings, unless an opportunity be given the plaintiff to amend, and he fail to do so.[4] The proper order to be made by the court is, that the proceedings be quashed, unless the plaintiff, within a designated time, file a sufficient affidavit. A judgment dissolving the attachment *and* giving leave to amend, is inconsistent, and may be reversed.[5]

If the statute provide only for the amendment of defects of *form* in the affidavit, the omission therefrom of a material averment cannot be supplied by amendment.[6] Under no power to amend can the entire omission of an affidavit be so supplied; for an amendment presupposes the existence of an affidavit, in a defective form.[7]

If when the attachment issues the affidavit be without date and not sworn to, the officer issuing it has no authority afterwards to amend it by allowing the party to sign and swear to it, and in-

[1] Inman *v.* Allport, 65 Illinois, 540.

[2] *Ante*, § 87.

[3] Booth *v.* Rees, 26 Illinois, 45; Moore *v.* Mauck, 79 Ibid. 391; Burnett *v.* McCluey, 92 Missouri, 230.

[4] Bunn *v.* Pritchard, 6 Iowa, 56; Watt *v.* Carnes, 4 Heiskell, 532; Claflin *v.* Hoover, 20 Missouri Appeal, 314. See analogous cases in regard to Attachment Bonds, *post*, § 147; Palmer *v.* Bosher, 71 North Carolina, 291.

[5] Graves *v.* Cole, 1 G. Greene, 405.

[6] Hall *v.* Brazelton, 40 Alabama, 406; 46 Ibid. 359.

[7] Greenvault *v.* F. & M. Bank, 2 Douglas, 498. See McReynolds *v.* Neal, 8 Humphreys, 12.

serting a date, without issuing a new writ.[1] But where the clerk dated his certificate to the affidavit "June 6," when it ought to have been "July 6," the court, finding by the evidence that it was a mere clerical error, allowed him to amend the certificate by substituting the latter date.[2]

If an affidavit be so defective that the writ issued upon it is void, no amendment can give validity to the writ, except as between the parties to the suit; it cannot cut off intermediate rights acquired by third persons in the property attached.[3] This doctrine was, in Kentucky, extended to a case where the writ was not void, but only irregular, in having been issued upon a defective affidavit.[4]

In amended affidavits the allegations must relate to the time of suing out the attachment; if they refer only to the existence of the ground for attachment when the amendment is made, they will not sustain the writ.[5]

§ 113 *a*. The Circuit Court of the United States in Michigan did not hold the rigid views expressed by the courts of that State in regard to affidavits, but decided that where right and justice require it the affidavit may be amended, though under the State statute the State court would have no power to allow such an amendment.[6]

[1] Watt *v.* Carnes, 4 Heiskell, 532. See Pope *v.* Hibernia Ins. Co., 24 Ohio State, 481; Union C. M. Co. *v.* Raht, 16 New York Supreme Ct. 208.

[2] Anderson *v.* Kanawha Coal Co., 12 West Virginia, 526.

[3] Whitney *v.* Brunette, 15 Wis. 61.

[4] Bell *v.* Hall, 2 Duvall, 288.

[5] Crouch *v.* Crouch, 9 Iowa, 269; Wadsworth *v.* Cheeny, 10 Ibid. 257; Robinson *v.* Burton, 5 Kansas, 293.

[6] Erstein *v.* Rothschild, 22 Federal Reporter, 61.

CHAPTER VI.

ATTACHMENT BONDS.

§ 114. It is the lawful right of every man, who believes that he has a just demand against another, to institute a suit and endeavor to obtain the proper redress. If his belief proves to be unfounded, his groundless proceedings may possibly cause a very serious injury to the defendant; the mere assertion of a serious claim at law being capable, in some circumstances, of affecting materially one's standing and credit. But to treat that as a legal wrong which consists merely in asserting a claim which cannot satisfactorily be established, would be plainly impolitic and unjust. The failure to sustain it might possibly have come from the death of a witness or other loss of testimony, from false evidence, from a mistake of law in the judge, from misconduct in the jury, from any cause rather than fault in the plaintiff himself. To compel him, as the penalty for instituting a suit he cannot sustain, to pay the costs of a defence is generally all that is just, and is sufficient to make persons cautious about instituting suits which they have reason to believe are baseless.[1] These views apply to the case of an attachment regularly issued by a court of competent jurisdiction on sufficient legal grounds. On common-law principles, if an attachment so issued should afterwards be dissolved, either because the action failed, or because, in a contest on the merits, the grounds upon which the attachment was obtained were found unsustainable, the defendant could have no recourse against the plaintiff for damages for the seizure of his property, unless the law required the plaintiff, in order to obtain attachment, to give a bond or undertaking for the payment of such damages. In the absence of such a requirement the defendant has no remedy for such damages, unless the conduct of the plaintiff was such as to give ground for an action for malicious or vexatious prosecution.[2] But inasmuch as the

[1] Cooley on Torts, 180.

[2] Day v. Bach, 46 New York Superior Ct. 460. See Palmer v. Foley, 71 New York, 106; Sturgis v. Knapp, 33 Vermont, 486; Lexington & O. R. R. Co. v. Applegate, 8 Dana, 289.

resort to the remedy by attachment is easily liable to abuse, and would oftentimes be productive of serious injury to the defendant, even when there was no malice or improper motive on the part of the plaintiff, laws have been enacted in many of the States requiring a plaintiff, before obtaining an attachment, to execute a bond, with security, for the indemnification of the defendant against damage by reason of the attachment. The terms of such instruments vary, but that is their usual scope. Sometimes, in order to protect defendants who do not appear to the action, a clause is added in the condition, that the plaintiff shall refund to the defendant any money recovered by means of the attachment, which was not justly due to him. This is merely giving, at the institution of the suit, what, by the custom of London, the plaintiff is required to give at its termination, in order to obtain execution against the garnishee.

§ 114 *a*. It might be regarded as hardly open to question, that each Legislature has a right to require such a bond or not, at its mere discretion; but in Nebraska this was disputed. There, the plaintiff is required to give this bond in every case of attachment, except against a foreign corporation or a non-resident of the State. A non-resident, against whom an attachment had issued, moved to discharge it on the ground that no bond had been given; basing his motion on Sec. 2 of Article IV. of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." This, it was claimed, was "intended to prevent such invidious discriminations against non-residents" as that of allowing attachments against them without giving bond, when it was required in cases against residents. The court overruled the motion.[1]

§ 114 *b*. This bond may be given by a corporation plaintiff, and its authority to give it will be presumed to exist as an incident to the ordinary power of suing and being sued, which pertains generally to incorporated companies.[2]

§ 114 *c*. A State suing by attachment in its own courts is not subject to the general law requiring a bond to be given; and if, nevertheless, a bond, with sureties be given in the name of the

[1] Marsh *v.* Steele, 9 Nebraska, 96.

[2] Bank of Augusta *v.* Conrey, 28 Mississippi, 667.

State, the sureties are not liable.[1] And if the statute authorize a county, city, or town to sue without giving bond, and yet a city gives a bond with security, it is given in contravention of the policy of the law, and is void.[2] But where the board of supervisors of a county instituted a suit by attachment on behalf of the county, and gave a bond with sureties; it was considered binding on the sureties, though not on the county.[3]

§ 115. Where the statute requires a bond to be given before the attachment issues, a failure to give it is fatal to the suit, unless the law authorize the defect to be cured; and the omission may be taken advantage of by the defendant, either upon a motion to dismiss, or in abatement,[4] but not upon demurrer to the complaint.[5] Great strictness has been manifested on this point, and without doubt very properly; for if the officer "could dispense with the requisites of the law for a part of a day, why might he not for a whole day, or many days, and at last the whole be excused by the answer that the defendant was still secured, and might make the plaintiff responsible, who might be amply able to discharge the damages recovered, although no bond was executed at all?"[6] And the omission to give the bond is not cured by the deposit, in lieu of it, of a sum of money with the officer who issued the attachment, unless the statute authorize such a substitution.[7]

§ 116. In Mississippi, the statute declares that an attachment issued without bond is void, and shall be dismissed; and the courts of that State have carried out the law rigidly; holding that the attachment is absolutely void;[8] that the want of a sufficient bond cannot be cured by filing a proper one after the suit is brought;[9] that the absence of a bond is not remedied by the ap-

[1] Renkert *v.* Elliott, 11 Lea, 235.

[2] Morgan *v.* Menzies, 60 California, 341.

[3] State *v.* Fortinberry, 54 Mississippi, 316.

[4] Bank of Alabama *v.* Fitzpatrick, 4 Humphreys, 311; Didier *v.* Galloway, 3 Arkansas, 501; Kellogg *v.* Miller, 6 Ibid. 468; Davis *v.* Marshall, 14 Barbour, 96, Kelly *v.* Archer, 48 Ibid. 68; Benedict *v.* Bray, 2 California, 251; Lewis *v.* Butler, Kentucky Decisions (Sneed), 290; Stevenson *v.* Robbins, 5 Missouri, 18; Van Loon *v.* Lyons, 61 New York, 22; Tiffany *v.* Lord, 65 Ibid. 310; Bradley *v.* Kroft, 19 Federal Reporter, 295; Elliott *v.* Plukart, 6 Penn. County Court, 151.

[5] Alexander *v.* Pardue, 30 Arkansas, 359.

[6] Hucheson *v.* Ross, 2 A. K. Marshall, 349.

[7] Bate *v.* McDowell, 48 New York Superior Ct. 219.

[8] Ford *v.* Hurd, 4 Smedes & Marshall, 683.

[9] Houston *v.* Belcher, 12 Smedes & Marshall, 514. See Elliott *v.* Plukart, 6 Penn. County Court, 151.

pearance of the defendant and his pleading to the action;[1] and that a judgment against a garnishee who has answered under an attachment issued without bond is void,[2] and no bar to a subsequent action against him by the attachment defendant for the same debt.[3] In Kentucky, where the bond was required to be in double the sum to be attached, and the statute declared that every attachment issued without such bond being taken should be illegal and void, the strict rule was at one time applied, in cases where the bond was below the required amount; and the attachment was, on writ of error by the defendant, declared void.[4] But this ruling was afterwards changed in a case where no bond at all was filed; the court holding that the word "void" was used in the statute incautiously, and was intended only to mean "voidable."[5] The same view is entertained in South Carolina.[6] In Ohio, where the statute provides that "the order of attachment shall not be issued by the clerk until there has been executed in his office an undertaking," &c., it was held, in an action where title to real estate, obtained through an attachment issued without such undertaking having been filed, was brought in conflict with a title obtained through a sale under execution, that the attachment was not void for want of the filing of the undertaking.[7]

§ 116 *a*. Whether the bond was in fact given before the writ issued is, it seems, not conclusively determined by the dates merely of the respective instruments; but the fact may be shown, that though the writ bears date anterior to the bond, yet its date was a mistake, and that the bond was filed before the writ issued.[8]

§ 117. But though an attachment sued out without sufficient bond having been taken, should be held to be, not voidable merely, but absolutely void as to the defendant, yet it will, unless the defect *appear on the face of the writ*, justify the officer in making a levy under it, and protect him from an action of trespass.[9] This was so held under a system which did not require it to be stated in the writ that a bond had been given.

[1] Tyson *v* Hamer, 2 Howard (Mi.), 669.
[2] Ford *v*. Woodward, 2 Smedes & Marshall, 260.
[3] Ford *v*. Hurd, 4 Smedes & Marshall, 683.
[4] Martin *v*. Thompson, 3 Bibb, 252; Samuel *v*. Brite, 3 A. K. Marshall, 317.
[5] Banta *v*. Reynolds, 3 B. Monroe, 80.
[6] Camberford *v*. Hall, 3 McCord, 345.
[7] O'Farrell *v*. Stockman, 19 Ohio State, 296.
[8] Snelling *v*. Bryce, 41 Georgia, 513.
[9] Banta *v*. Reynolds, 3 B. Monroe, 80; Owens *v*. Starr, 2 Littell, 230.

Had the law so required, and the writ had not so stated, the rule would probably have been different.

§ 118. But though an officer executing the writ under such circumstances is not liable as a trespasser, yet the party who causes the writ to issue without giving bond, and the officer who issues it, are both so liable to the defendant.[1] And in Kentucky, under a statute which declared that "the order of attachment shall not be issued by the clerk until there has been executed, in his office, by one or more sufficient sureties of the plaintiff, a bond," &c., it was said by the Court of Appeals, that the clerk is bound at his peril to know that the surety tendered is sufficient.[2]

§ 119. As in the case of the affidavit, the bond must appear in the record of the action;[3] but, unless required by statute, the omission to recite in the writ that a bond was given, will not vitiate the attachment.[4]

§ 120. When it is required that a bond shall be approved by a clerk of court, and he refuses to approve it, he acts in a *quasi* judicial capacity, and his judgment and decision cannot be controlled by *mandamus;* but he may be thereby compelled to consider and pronounce on the sufficiency of the bond in form, penalty, and sureties.[5] And when such approval is required, it is not necessary for him to indorse his approval on the bond; that is but evidence of the fact, which may be otherwise proved.[6] If he receives and files the bond, he is estopped from afterwards denying that he approved it.[7] And as against the defendant, the issue of the writ is an approval of the bond, as much as if the approval had been written upon it.[8] Much more is it so, if there be on the bond a memorandum of its acceptance, though not signed by the clerk, and the writ recite the filing of the bond.[9] And his approval is but *prima facie* evidence of the sufficiency of the sureties, subject to be overthrown.[10]

[1] *Post*, § 411 *a*; Barkeloo *v.* Randall, 4 Blackford, 476.

[2] Horne *v.* Mitchell, 7 Bush, 131.

[3] Cousins *v.* Brashear, 1 Blackford, 85.

[4] Hays *v.* Gorby, 3 Iowa, 203; Ellsworth *v.* Moore, 5 Ibid. 486.

[5] Mobile M. Ins. Co. *v.* Cleveland, 76 Alabama, 321.

[6] Mandel *v.* Peet, 18 Arkansas, 236; Griffith *v.* Robinson, 19 Texas, 219; West *v.* Woolfolk, 21 Florida, 189.

[7] Pearson *v.* Gayle, 11 Alabama, 278; Dothard *v.* Sheid, 69 Ibid. 135; Hyde *v.* Adams, 80 Ibid. 111.

[8] Levi *v.* Darling, 28 Indiana, 497. *Sed contra*, Elliott *v.* Plukart, 6 Penn. County Court, 151.

[9] Howard *v.* Oppenheimer, 25 Maryland, 350. See Anderson *v.* Kanawha Coal Co, 12 West Virginia, 526.

[10] Blaney *v.* Findley, 2 Blackford, 338.

If a person holding the office of clerk of a court institute a suit by attachment in that court, the approval of the bond by his deputy is of no value; the bond is a nullity in sustaining the attachment.[1]

§ 121. The bond must be *actually executed and delivered* before the writ issues. It will not answer for the party to prepare what may be made into the required instrument, and leave it incomplete. Therefore, where it appeared that the plaintiff, before the writ issued, filed with the clerk a half-sheet of paper, upon which he and another person had signed their names, but that the paper was otherwise blank, it was decided that, as the ceremonies necessary to a bond consist of *writing*, *sealing*, and *delivery*, none of which existed in this case, there was no bond, and the writ was quashed.[2] So where the bond was in every respect in conformity to law, except that it was not sealed.[3]

§ 121 *a*. When a bond is executed by the plaintiff, and delivered to the officer who is to issue the attachment, no agreement between them as to any condition subsequent, upon which the bond was to become unavailable in the case, can have any effect upon the right of the attachment defendant to recover thereon. Thus, where the plaintiff at the time of obtaining an attachment executed a bond and left it with the officer, with the condition and agreement that the officer might use it as the basis of an attachment in case the plaintiff failed to produce a decision of the Supreme Court that such bond was unnecessary; and that it was not to be so used unless the plaintiff so failed; and within twenty-four hours thereafter the officer issued the attachment; and afterwards the plaintiff produced to him a decision of the Supreme Court to the effect stipulated; whereupon the officer delivered the bond up to the plaintiff, who destroyed it; and afterwards the attachment defendant sued upon it; it was held, that the defendant's right of action upon it was not affected by the agreement between the plaintiff and the officer.[4]

§ 121 *b*. It would hardly seem probable that, under any system of attachment laws, the presence in which the bond is executed could be considered material; but it is so regarded in

[1] Owens *v.* Johns, 59 Missouri, 89.

[2] Boyd *v.* Boyd, 2 Nott & McCord, 125; Perminter *v.* McDaniel, 1 Hill (S. C.), 267.

[3] State *v.* Thompson, 49 Missouri, 188; State *v.* Chamberlin, 54 Ibid. 338.

[4] Bennett *v.* Brown, 20 New York, 99.

Kentucky, under a statute declaring that "the order of attachment shall not be issued by the clerk until there has been executed *in his office*, a bond to the effect," &c. It was held, that, unless the bond was executed *in the presence* of the clerk it was unauthorized, and that the order of attachment was improperly issued.[1]

§ 122. If the bond be actually executed, according to the statutory requirement, but before its return into court it be accidentally destroyed, the failure to return it will not be a cause for quashing the attachment, though the statute require it to be returned.[2] Nor will the failure of the officer to return it into court authorize the attachment to be dissolved, if no blame be chargeable to the plaintiff.[3]

§ 123. If it appear, from the date or recitals in the bond, that it was not executed until after the writ issued, it will be fatal to the attachment, where its execution, as is usually the case, is a condition precedent to the issue of the writ.[4] Therefore, where the attachment and bond bore date on the same day, and the bond recited that on that day the plaintiff *had first* issued or obtained the attachment, the attachment was quashed.[5] But where, under similar circumstances and similar statutory requirements, the bond recited that the plaintiffs "*have* this day sued out an attachment," it was held, on a motion to quash, that though the issue of the writ before the giving of the bond would be fatal, yet that the recital of the bond was not evidence of the fact. "The recital," say the court, "was evidently intended to identify the case in which the bond was given, and not to indicate its order, in point of time, in the proceedings. Nothing more was meant, or is necessarily to be inferred from it, than that it was intended as the bond required to be given in the case, wherein the plaintiffs had instituted proceedings by filing their petition and making affidavit for the purpose of suing out an attachment; not that the writ had actually been issued by the clerk already. That is not a necessary, nor, when it is considered that it would have involved the violation of duty by the clerk, is it a probable conclusion."[6] And so, where the condition of the bond required

[1] Horne *v.* Mitchell, 7 Bush, 131.

[2] Wheeler *v.* Slavens, 13 Smedes & Marshall, 623.

[3] Bank of Augusta *v.* Conrey, 28 Mississippi, 667; State Bank *v.* Hinton, 1 Devereux, 397.

[4] Osborn *v.* Schiffer, 37 Texas, 434.

[5] Hucheson *v.* Ross, 2 A. K. Marshall, 349; Root *v.* Monroe, 5 Blackford, 594.

[6] Wright *v.* Ragland, 18 Texas, 289. See McClanahan *v.* Brack, 46 Mississippi, 246.

the plaintiff to prosecute to effect an attachment "granted," and the bond and the attachment were of the same date, the court considered it unnecessary to set forth in the bond that it was taken before granting the writ, but that would be presumed. "The object of the law," said the court, "was to prevent an attachment from being issued without giving the defendant the security afforded by the bond, and the least possible division of time is a sufficient priority. If the law has been substantially fulfilled, the court will not permit the object to be defeated, because the phraseology of some part of the proceedings may not be critically correct." [1]

But though the recital of a bond should indicate that the attachment had been previously obtained, it will not be sufficient to quash the writ, if it appear on inspection of the record that the writ was in fact subsequently issued. This, however, could not be shown by parol evidence.[2]

§ 124. The sufficiency of the bond to sustain the attachment may be questioned, either as to its terms, parties, or amount. If there be a bond, but not such as the law requires, it will be the same as if there were no bond, unless an amendment of it be authorized by statute.[3] A substantial compliance with the statute, however, seems to be in general sufficient.[4] And if a word be omitted by mistake from the bond, and, by looking at the whole instrument and the statute under which it is given, it is apparent what word was intended to be inserted, the omitted word may be supplied, and the contract read as if it had been expressed, without first reforming it by supplying the omitted word.[5] But whatever objections the defendant may have to the bond should be presented before he pleads to the merits;[6] unless the law authorize a new bond to be required where the surety becomes insolvent after its execution. In that case, the fact may be shown after pleading to the merits.[7]

§ 124 *a*. An intrinsic defect in the bond, apparent on its face, can be reached by a motion to quash the writ; but an objection

[1] McKenzie *v.* Buchan, 1 Nott & McCord, 205.

[2] Summers *v.* Glancey, 3 Blackford, 361; Reed *v.* Bank of Kentucky, 5 Ibid. 227.

[3] Bank of Alabama *v.* Fitzpatrick, 4 Humphreys, 311; Houston *v.* Belcher, 12 Smedes & Marshall, 514; Hisler *v.* Carr, 34 California, 641; Kelly *v.* Archer, 48 Barbour, 68; Elliott *v.* Plukart, 6 Penn. County Court, 151.

[4] O Neal *v.* Owens, 1 Haywood (N. C.), 362; Leach *v.* Thomas, 2 Nott & McCord, 110.

[5] Frankel *v.* Stern, 44 California, 168.

[6] Hart *v.* Kanady, 33 Texas, 720.

[7] Ealer *v.* McAllister, 14 Louisiana Annual, 821.

to an extrinsic defect, or one which must be sustained or rebutted by evidence *aliunde*, must be taken by plea. This was so held where, in an attachment bond in a suit by a national bank, a stockholder in the bank was a surety, and for that reason a motion was made to quash the attachment. The motion was overruled, not only on the ground here stated, but also because there was nothing illegal in the stockholder's becoming surety.[1]

§ 125. *As to the Terms of the Bond.* A statute requiring a bond in a stated penalty, with a specified condition, is not complied with by the execution of an unsealed stipulation;[2] nor is it met by the execution of a covenant, by which the plaintiff and his security promise to pay to the defendant the amount of the penalty stated in the statute, *or* all damages and costs he may sustain by reason of the issue of the attachment.[3] And if such an instrument be declared on as a bond with a condition, and a breach thereof be assigned, when it is produced on the trial the variance will be fatal.[4]

§ 126. When a statute in one clause provides what shall be the condition of the bond, and in another sets forth the *form* of the condition, the proper course is to follow the form, without regard to the language of the statute elsewhere.[5] Indeed, it has been decided, that if the bond follow the language of the statute instead of the form prescribed, when they are variant from each other, it will be void.[6]

§ 127. To state in the bond that the suit is brought in a court other than that in which it is brought, is a fatal error;[7] as is likewise an omission to name the court;[8] but a misrecital in a bond of the term of the court to which the attachment is returnable, does not vitiate it: the affidavit and the writ control the terms of the instrument.[9] But where the bond recited the time when the court was to be held, as "the first Monday in June,"

[1] *Post*, §§ 133, 415; City Nat. Bank *v.* Cupp, 59 Texas, 268.

[2] Van Loon *v.* Lyons, 61 New York, 22; Tiffany *v.* Lord, 65 Ibid. 310.

[3] Homan *v.* Brinckerhoff, 1 Denio, 184.

[4] Rochefeller *v.* Hoysradt, 2 Hill (N. Y.), 616.

[5] Love *v.* Fairfield, 10 Illinois (5 Gilman), 303; Lucky *v.* Miller, 8 Yerger, 90.

[6] McIntyre *v.* White, 5 Howard (Mi.), 298; Amos *v.* Allnutt, 2 Smedes & Marshall, 215; Proskey *v.* West, 8 Ibid. 711.

[7] Bonner *v.* Brown, 10 Louisiana Annual, 834.

[8] Lawrence *v.* Yeatman, 3 Illinois (2 Scammon), 15.

[9] Houston *v.* Belcher, 12 Smedes & Marshall, 514.

without designating it as the *next county court*, it was considered defective, but amendable.[1] And so, where the bond was dated on the 4th day of January, 1836, and recited the attachment as returnable "to the county court to be held on the third Monday of January, instant," while the attachment bore date the 4th of January, 1838, the bond was considered defective.[2]

§ 128. It is no objection to a bond that it is not dated, where a date is not required by statute to be named in it.[3] It takes effect from the date of its filing.[4]

§ 129. An insufficient description of the parties, or the suit, will vitiate the bond. Thus, where the obligors acknowledge themselves bound, "conditioned that A. B., plaintiff in attachment against, ——, defendant, will prosecute," &c., it was held, that the attachment could not be sustained.[5]

§ 129 *a*. A blank in the penalty of the bond vitiates it, and the defect cannot be supplied by oral proof.[6] But a blank in the place where the name of the surety ought to appear in the body of the instrument, — thus, where the language used is: "We, A. B. and ——, hereby undertake," &c., — will not affect the validity of the instrument or the obligation of the surety.[7]

§ 130. While any substantial departure from a prescribed form, or omission from the instrument of terms required by the statute, will be fatal to the action, unless remediable by amendment, the addition of terms not required will not have that effect. Thus, where a bond contained all the requisite conditions, with the further one, "that the plaintiff shall prosecute his attachment with effect at the court to which it is returnable;" it was held, that this did not authorize the attachment to be dismissed.[8] So where, in addition to the legally required terms, the clerk inserted in the bond the words "shall, moreover, abide by and perform such orders and decrees as the court may make in the cause;" these words were held void, and were

[1] Planters & Merchants Bank *v.* Andrews, 8 Porter, 404.

[2] Lowry *v.* Stowe, 7 Porter, 483.

[3] Plumpton *v.* Cook, 2 A. K. Marshall, 450.

[4] Claflin *v.* Hoover, 20 Missouri Appeal, 214.

[5] Schrimpf *v.* McArdle, 13 Texas, 368.

[6] Copeland *v.* Cunningham, 63 Alabama, 394.

[7] McLain *v.* Simington, 37 Ohio State, 484. See Affeld *v.* The People, 12 Bradwell, 502; Hann *v.* Ruse, 35 Louisiana Annual, 725.

[8] Kahn *v.* Herman, 3 Georgia, 266.

rejected as surplusage.[1] So, where the bond was required to be made to the State of Arkansas, and a bond was made to that State, "for the use and benefit of the defendant;" those words were treated as surplusage, not affecting the validity of the bond.[2]

§ 131. *As to the Parties to the Bond.* If it be required that the bond be given by the plaintiff, and no provision exists for its being given by any other person, a bond executed by a stranger to the suit will be invalid. This was so held, where the statute declared that no writ of attachment should issue "before the plaintiff has given bond;"[3] and also under a statute requiring bond to be taken of "the party for whom the attachment is-sued."[4] This rule, however, is to be applied within its reason, and not arbitrarily and literally, without regard to circumstances. Therefore, where bond was required to be taken from "the party plaintiff," a bond executed by one to whose use the suit was brought, was considered as within the meaning of the statute.[5] And so, under a statute providing that "the creditor shall likewise file with the clerk a bond to the defendant with sufficient security," a bond was signed in the plaintiff's name by an agent having no authority therefor, and by competent sureties; and it was held sufficient, though not the act of the plaintiff, because the reason of the law was satisfied by the sufficiency of the security.[6] So, under a statute requiring a bond "on the part of the plaintiff with sufficient sureties," a bond signed by two persons, not styling either of them as principal or either of them as surety, was held to be a substantial compliance with the statute.[7] But where, under a law requiring bond to be taken of "the party for whom the attachment issued," an attorney at law executed the bond in his own name, conditioned that *he* should pay and satisfy all costs which should be awarded to the defendant, in case *he* should be cast, &c.; the bond was held bad, and the attachment set aside.[8]

[1] Banning *v.* Reeves, 2 Tennessee Ch'y, 263.

[2] Steamboat Napoleon *v.* Etter, 6 Arkansas, 103.

[3] Myers *v.* Lewis, 1 McMullan, 54; Elliott *v.* Plukart, 6 Penn. County Court, 151.

[4] Mantz *v.* Hendley, 2 Hening & Munford, 308.

[5] Grand Gulf R. R. & B. Co. *v.* Conger, 9 Smedes & Marshall, 505; Murray *v.* Cone, 8 Porter, 250.

[6] Taylor *v.* Ricards, 9 Arkansas, 378. See State *v.* Fortinberry, 54 Mississippi, 316.

[7] Howard *v.* Manderfield, 31 Minnesota, 337.

[8] Mantz *v.* Hendley, 2 Hening & Munford, 308.

§ 132. Though the plaintiff is usually required to execute the bond, yet as that might often be impracticable, it is generally provided that it may be done by his agent, attorney, or other person. In such case the word *attorney* in the statute will be considered to include an attorney at law, as well as an attorney in fact;[1] and it is held, that one acting in the former capacity, in the collection of a debt in a State where he is authorized to practise law, may, as an incident of his employment, execute the bond in the name of his client. In the language of the Supreme Court of Louisiana, "the signing of the bond is an act of administration alone, indispensable to secure the rights of the client, and is fully conferred by the mandate in general terms. The mandate is to collect his debt by process of law. If no agent or attorney in fact is constituted, the attorney at law is the mandatary for this purpose. The signing of the attachment bond is a necessary incident to the collection of the debt, and is embraced in the general power to make the collection." But the same court refused to extend this doctrine to the case of an attorney at law from another State, who was not licensed to practise in the courts of Louisiana.[2]

Under statutes of similar import, it is held, that a bond signed by one, as principal, styling himself agent of the plaintiff, is a compliance with the statute;[3] and this view was taken also in cases where he did not so style himself, but signed the bond simply in his personal capacity.[4]

In Florida, under a statute providing that "before the issuing of any writ of attachment, the party applying for the same shall by himself, his agent, or attorney, enter into bond with two or more securities," a bond executed by an agent of the plaintiff, in his own name as agent,[5] or by the attorney who instituted the suit, in his own name as attorney,[6] was held a sufficient compliance with the law; but that a bond executed by the plaintiff's agent in his own name, without describing himself as agent, though he was so described in the affidavit, was fatally defective.[7] In Pennsylvania, under a statute requiring the bond to be executed by "the plaintiff or some one on his behalf," it was held

[1] Trowbridge *v.* Weir, 6 Louisiana Annual, 706.

[2] Wetmore *v.* Daffin, 5 Louisiana Annual, 496.

[3] Dillon *v.* Watkins, 2 Speers, 445; Walbridge *v.* Spalding. 1 Douglas, 451; Stewart *v.* Katz, 30 Maryland, 334; Gable *v.* Brooks, 48 Ibid. 108.

[4] Frost *v.* Cook, 7 Howard (Mi.), 357; Page *v.* Ford, 2 Smedes & Marshall, 266; Clanton *v.* Laird, 12 Ibid. 568.

[5] Conklin *v.* Goldsmith, 5 Florida, 280.

[6] Simpson *v.* Knight, 12 Florida, 144.

[7] Work *v.* Titus, 12 Florida, 628.

that a bond signed by one describing himself as "agent and attorney in fact" was insufficient; that his mere declaration of his being agent or attorney was not enough.[1]

§ 133. Where the bond purports to be the act of the plaintiff, by an attorney in fact, the court will not hold it a nullity because no power of attorney under seal is produced;[2] but the authority of the attorney will be presumed, on the hearing of a motion to quash the writ on account of the insufficiency of the bond. If it be intended to question the authority, it must be done by plea to that effect;[3] for the agent's authority is a matter of evidence *aliunde*, and forms no part of the bond; and on a motion to quash or dismiss, the court will not inquire into the fact of agency, but presume it.[4] The utmost extent to which the court would go in such a case, would be to rule the party to produce within a reasonable time the power of attorney under which he acted.[5]

In cases of this description, to show that the agent had no authority to execute the bond is no ground, of itself, for abating the action; but, shown in connection with the further fact, that the agent had no authority for instituting the suit, and that the suit is not prosecuted with the authority or consent of the plaintiff, it would be.[6]

§ 134. Whether a subsequent ratification by the plaintiff, of an unauthorized act of a party in signing his name to the bond, will remedy the defect, has been differently decided. In Louisiana, it is held in the negative.[7] But in the case from Mississippi, cited in the last section,[8] it will be observed that, to defeat the action on account of want of authority in the agent, it must be shown, likewise, that he had no authority for instituting the suit, and that the suit is not prosecuted with the authority or consent of the plaintiff. Afterwards, in the same State, it was expressly decided, that if the plaintiff appear and prosecute the action, it will be considered a recognition of the agent's

[1] Elliott *v.* Plukart, 6 Penn. County Court, 151.

[2] Wood *v.* Squires, 28 Missouri, 528.

[3] Alford *v.* Johnson, 9 Porter, 320; Messner *v.* Hutchins, 17 Texas, 597; Wright *v.* Smith, 19 Ibid. 297; Tingle *v.* Brison, 14 West Virginia, 295.

[4] Lindner *v.* Aaron, 5 Howard (Mi.), 581; Spear *v.* King, 6 Smedes & Marshall, 276; Jackson *v.* Stanley, 2 Alabama, 326; Goddard *v.* Cunningham, 6 Iowa, 400; Wright *v.* Smith, 19 Texas, 297; Messner *v.* Lewis, 20 Ibid. 221; McDonald *v.* Fist, 53 Missouri, 343.

[5] Lindner *v.* Aaron, 5 Howard (Mi.), 581.

[6] Dove *v.* Martin, 23 Mississippi, 588.

[7] Grove *v.* Harvey, 12 Robinson (La.), 221.

[8] Dove *v.* Martin, 23 Mississippi, 588.

authority, so as to sustain the suit.[1] And in Arkansas, a subsequent ratification by the plaintiff will sustain the bond, and a plea in abatement alleging want of authority in the agent, is insufficient, unless it exclude the conclusion that a ratification has taken place.[2] And in Texas, if the suit should be abated because the agent had no authority, the plaintiff will, nevertheless, be liable on the bond, if the agent acted at his instance, and was afterwards sustained by him in the prosecution of the suit.[3]

§ 134 *a*. If the statute require a bond to be given; "with sureties," but without designating how many, will a bond with one surety be sufficient? This question came up in Iowa, where it was held, that the attachment could not be quashed because there was only one surety in the bond. The court called to its aid a provision of the Code of that State, that "words importing the singular number only may be extended to several persons or things, and words importing the plural number only may be applied to one person or thing;" and held, that, as the object of the law is to afford indemnity to the defendant for the wrongful suing out of the attachment; and as this may be, and often is, as effectually done by one as by a half-dozen securities; and as it was the business of the clerk who took the bond to see that the surety was sufficient; the law was in effect complied with by the presentation of one surety.[4]

§ 134 *b*. Under a statute requiring the plaintiff to "enter into bond with two good and sufficient securities, payable to the defendant, in at least double the debt or sum demanded," each of the two sureties justified in an amount equal to that sworn to; and the defendant moved to dismiss the attachment because each had not justified in double that amount, but it was held, that the bond was sufficient, in the absence of evidence showing that the securities were not good for the amount of its penalty.[5]

§ 134 *c*. Where the statute requires a bond "with good security, in an amount at least double the debt sworn to," the securities in the bond must be good for its whole amount; and if proceedings to verify the sufficiency of the bond be taken, and the sureties be found not to be good for that amount, but to be good for a smaller amount, it is not admissible for the plaintiff

[1] Bank of Augusta *v.* Conrey, 28 Mississippi, 667.
[2] Mandel *v.* Peet, 18 Arkansas, 236.
[3] Peiser *v.* Cushman, 13 Texas, 390.
[4] Elliott *v.* Stevens, 10 Iowa, 418.
[5] May *v.* Gamble, 14 Florida, 467.

to amend by reducing his demand, so that the amount for which the sureties are found to be good shall be double the amount claimed after the reduction.[1]

§ 135. Where the law required the sureties in the bond to be residents of the State, it was considered unnecessary to state in the instrument that they were so; the fact would be presumed.[2]

§ 136. It is not unusual for a name seeming to represent a partnership to be signed to a bond thus, "A. & B." *Prima facie* such a signature would be supposed, as a matter of fact, to represent two persons; but it is not to be so held as a matter of law. Whether it does in a particular case represent two persons, is a question not to be raised on a motion to quash, but under a plea framing an issue of fact. The presumption is, that the officer who took the bond satisfied himself before taking it that the person who signed the firm name had authority from the other members of the firm to sign it;[3] and that presumption must be rebutted, if at all, by the party interested in defeating the bond.[4] This view is not affected by the rule that, the bond being under seal, the authority to sign the partnership name must also have been under seal; for this is held to be one of the limitations and exceptions to that rule which largely modify its operation.[5] It is, therefore, no objection to a bond given in a suit by a copartnership, that the partnership name was signed to it by one of the firm instead of the individual names of the several partners; it is, at any rate, binding on him.[6] And where the undertaking was not under seal, and the plaintiffs were a partnership, and the sureties were also, and they signed in their respective partnership names, the undertaking was held sufficient.[7]

Under a statute requiring a bond to be taken of "the party for whom the attachment issued," it was considered, in a suit by a mercantile firm, that a bond entered into by one of the firm in his own name, was sufficient, where it appeared in the instrument that he executed it as one of the firm, and sufficiently described the suit as being by, and for the benefit of, the firm.[8]

[1] Lockett *v.* Neufville, 55 Georgia, 453.
[2] Jackson *v.* Stanley, 2 Alabama, 326.
[3] Donnelly *v.* Elser, 69 Texas, 282.
[4] Claflin *v.* Hoover, 20 Missouri Appeal, 214.
[5] Cunningham *v.* Lamar, 51 Georgia, 574.
[6] Thatcher *v.* Goff, 13 Louisiana. 360; Dow *v.* Smith, 8 Georgia, 551; Jeffreys *v.* Coleman, 20 Florida, 536; Claflin *v.* Hoover, 20 Missouri Appeal, 214; Gray *v.* Steedman, 63 Texas, 95; Munzesheimer *v.* Heinze, 74 Ibid. 254.
[7] Danforth *v.* Carter, 1 Iowa, 546; Churchill *v* Fulliam, 8 Ibid. 45.
[8] Kyle *v.* Connelly, 3 Leigh. 719; Wallis *v.* Wallace, 6 Howard (Mi.), 254.

But where the bond recited that the individual partner had sued out the attachment, and was conditioned that if *he* should be cast in the suit, *he* should pay all costs and damages recovered against *him* for suing out the writ, it was decided that the bond was not in compliance with the statute, and the attachment was quashed.[1]

§ 137. The statutes of the different States vary, as to who shall be named as obligee in the bond. In some States, it is the defendant; in others, the bond is payable to the State, with statutory provision for suit on it in the name of the State, to the use of the party injured. In the latter case, it could not well be that any mistake should be made in naming the obligee; but otherwise in the former; and it is important to avoid errors on this point, as they would, if made in a material particular, be fatal to the attachment. Thus, where an attachment was issued against a firm by its copartnership name, and the bond was given to two persons as individuals, who, though of the same surnames as those constituting the firm, were yet not described in the bond as being the partners of the house; it was held, that the statute requiring the bond to be "payable to the defendant" was not complied with, and the attachment was quashed.[2] But where the suit was against A. B. and C., composing the firm of A. & Co., and the bond was made payable to A. & Co., it was held sufficient.[3]

§ 138. *As to the Amount of the Bond.* This is in all cases regulated by statute; and the importance of correctness in this respect is so manifest, and the means of exactness so simple, that few questions have arisen in reference to it.

§ 139. It is no objection that the bond is in a greater sum than is required by law;[4] but if it be less it will be fatal, unless amendable.[5]

[1] Jones *v.* Anderson, 7 Leigh, 308.

[2] Birdsong *v.* McLaren, 8 Georgia, 521.

[3] De Caussey *v.* Bailey, 57 Texas, 665. See Gray *v* Steedman, 63 Ibid. 95, where the court expressly refused to follow the Georgia court in its ruling in Birdsong *v.* McLaren, *ut supra.*

[4] Fellows *v.* Miller, 8 Blackford, 231; Shockley *v.* Davis, 17 Georgia, 175; Bourne *v.* Hocker, 11 B. Monroe, 21.

[5] Williams *v.* Barrow, 3 Louisiana, 57; Martin *v.* Thompson, 3 Bibb, 252; Samuel *v.* Brite, 3 A. K. Marshall, 317; Marnine *v.* Murphy, 8 Indiana, 272. But in Louisiana the court refused to notice the deficiency, as a ground for setting aside the attachment, where it was less than one dollar. Bodet *v.* Nibourel, 25 Louisiana Annual, 499.

§ 140. In South Carolina, where the statute requires the bond to be in double the amount *sued for*, if the action be assumpsit, the bond must be in double the sum stated in the writ; if debt, and the damages stated in the writ are merely nominal, the debt is the sum sued for and the criterion of the amount of the bond; but if the damages are laid to cover the interest which may be due, then the debt and damages are the sum sued for, and the bond must be in double that sum.[1] In that State the attachment used to be obtained without a statement under oath of the amount actually sued for, and there was therefore nothing by which that amount could be fixed, except the sum claimed in the writ.[2]

§ 141. In Louisiana, where the actual sum claimed by the plaintiff must be stated in the petition on which the suit is founded, the following case arose under a law which required the bond to be "in a sum exceeding by one half that claimed by the plaintiff." The plaintiff, in order to obtain the attachment, swore that the sum of $2,350, besides interest, damages, &c., was due to him. Afterwards, on filing his petition, setting forth his cause of action, he claimed a greater amount, which resulted from an allegation of damages, and a fixation of the rate of interest; and it was held, that his claiming in his petition a greater amount than in his affidavit, did not invalidate the attachment, and that the bond, being in a larger sum by one half than that named in the affidavit, was sufficient, though it was not in a larger sum by one half than that claimed in the petition.[3]

But where the plaintiff claimed in his affidavit a certain sum, with interest at a designated rate, from a given date, and the bond did not exceed, by one half, the amount due, principal and interest, it was held to be fatal to the attachment. This case was distinguished from that just cited, "because in that case the affidavit stated a certain sum as due, 'besides interest, damages, &c.' The bond was properly proportioned to the sum named, and it was considered that the words 'interest, damages, &c.,' were to be disregarded, because neither the rate of interest, nor the time for which it ran, was stated."[4] But afterwards the same court, in again affirming their first position, that the claiming in the

[1] Young *v.* Grey, Harper, 38; Callender *v.* Duncan, 2 Bailey, 454; Brown *v.* Whiteford, 4 Richardson, 327.

[2] Brown *v.* Whiteford, 4 Richardson, 327.

[3] Pope *v.* Hunter, 13 Louisiana, 306; Jackson *v.* Warwick, 17 Ibid. 436.

[4] Planters' Bank *v.* Byrne, 3 Louisiana Annual, 687; Graham *v.* Burckhalter, 2 Ibid. 415.

petition of a greater sum than that sworn to was not a cause for dissolving the attachment, yet held that the judgment could not be given, with privilege, for a greater amount than that named in the affidavit, nor would the plaintiff be justified in holding, under a levy, a greater amount of property than was necessary to cover that sum and costs.[1] And this defect in the amount of the bond cannot be cured by filing an additional bond, sufficient in amount to cover the additional amount claimed.[2] Nor is it obviated by the fact that the amount of the bond was fixed by an order of the judge who granted the attachment.[3]

In Georgia, under a statute requiring "a bond in a sum at least equal to double the amount sworn to be due," the plaintiff swore that there was due him $45.92, *besides interest;* and the bond was given for double the sum of $45.92; and it was held sufficient.[4] But where, under a statute requiring the bond to be in amount "at least double the sum demanded," and the plaintiff swore to the principal amount due him, and also to a *named sum* for interest thereon: and the bond was in double the amount of the principal sum only; it was, in Florida, held bad.[5]

§ 142. Where the law required the bond to be in double the sum *sworn to*, a misrecital in the bond of the amount sworn to, whereby it appeared that the bond was not in double that sum, but less, was held not to vitiate the bond, as the affidavit controlled in ascertaining the true sum.[6]

§ 143. In all these cases of defective or insufficient bond, the defendant is usually the only party who can take advantage of the defect. A subsequent attaching creditor cannot be allowed to become a party to the suit, so as to take advantage of the defect, in order that his attachment may take the property.[7]

§ 144. As to the time when advantage should be taken by the defendant of defects in the bond, for the purpose of defeating the attachment, the rule laid down as to affidavits may be considered applicable, that the exception must be taken *in limine*.[8] In

[1] Fellows *v.* Dickens, 5 Louisiana Annual, 131.

[2] Graham *v.* Burckhalter, 2 Louisiana Annual, 415.

[3] Fleitas *v.* Cockrem, 101 U. S. 301.

[4] Saulter *v.* Butler, 10 Georgia, 510.

[5] Gallagher *v.* Cogswell, 11 Florida, 127.

[6] Lawrence *v.* Featherston, 10 Smedes & Marshall, 345.

[7] Camberford *v.* Hall, 3 McCord, 345; McKenzie *v.* Buchan, 1 Nott & McCord, 205; Wigfall *v.* Byne, 1 Richardson, 412; Van Arsdale *v.* Krum, 9 Missouri, 397.

[8] Garmon *v.* Barringer, 2 Devereux &

Mississippi, as we have seen,[1] the defect is not cured by appearance and plea; but it is nowhere else so held, and in South Carolina and Michigan the reverse is the rule.[2] It follows that the objection comes too late in an appellate court, particularly when it was not made in the court below.[3] A defendant's appearance, by attorney, however, to move for the dismissal of an attachment and to except to the jurisdiction of the court over him, is held not to be such an appearance as will be construed into a submission to the jurisdiction.[4]

§ 145. The extent to which courts may make requirements on parties in regard to bonds, must depend entirely on statutory authority, except as to those matters which are apparent on the face of the proceedings. If a bond, legal in its terms, parties, and amount, be given at the institution of the suit, and accepted by the proper officer, the court will not, without some statutory authority, look into any alleged want of sufficiency in the parties. Thus, if the sureties were insolvent when they signed the bond, or have since become so, the court will not, without such authority, sustain a motion to require additional security.[5]

§ 146. There is no power in a court, except as conferred by law, to allow an amendment of an insufficient bond;[6] but this authority is now given in several States. In Missouri, under a statute authorizing the court to "order another bond to be given," where that given "is insufficient, or any security therein has died, or removed from the State, or has become, or is likely to become, insolvent," a bond was given, which was defective, through the omission of a material clause in the condition, and leave was given the plaintiff to file an amended bond. It was contended that such an amendment was not contemplated by the

Battle, 502; Stoney v. McNeill, Harper, 156; Watson v. McAllister, 7 Martin, 368; Enders v. Steamer Henry Clay, 8 Robinson (La.), 30; Voorhees v. Hoagland, 6 Blackford, 232; Beecher v. James, 3 Illinois (2 Scammon), 462.

[1] *Ante*, § 116.

[2] Young v. Grey, Harper, 38; Bryant v. Hendee, 40 Michigan, 543.

[3] Conklin v. Harris, 5 Alabama, 213; Fleming v. Burge, 6 Ibid. 373; Burt v. Parish, 9 Ibid. 211; Bretney v. Jones, 1 G. Greene, 366; Miere v. Brush, 4 Illinois (3 Scammon), 21; Morris v. Trustees, 15 Ibid. 266; Lawver v. Langhans, 85 Ibid. 138; Kritzer v. Smith, 21 Missouri, 296.

[4] *Ante*, § 112; Bonner v. Brown, 10 Louisiana Annual, 334; Johnson v. Buell, 26 Illinois, 66. *Sed contra*, Whiting v. Budd, 5 Missouri, 443; Evans v. King, 7 Ibid. 411.

[5] Proskey v. West, 8 Smedes & Marshall, 711.

[6] Roulhac v. Rigby, 7 Florida, 336; Tanner & D. E. Co. v. Hall, 22 Ibid. 391.

statute, but that the insufficiency must be for the reason either that the security had died or removed from the State, or had become, or was likely to become, insolvent; but it was held, that if such was the intention of the legislature, the words "that the bond given by the plaintiff is insufficient" might as well have been omitted; and that the amendment was rightly permitted.[1]

§ 147. Under a statute which provided that "the plaintiff, before or during the trial, should be permitted to amend any defects of form in the original papers," it was held, that a defective bond might be amended by the substitution of a new and perfect one;[2] and that a defect in the bond would not be a sufficient cause for quashing the proceedings, unless an opportunity were given to the plaintiff to execute a perfect bond, and he declined doing so.[3]

§ 148. Where this right to amend is given, it makes no difference whether the bond be void or only defective: in either case it is the duty of the court to permit the plaintiff to substitute a sufficient bond.[4] But the application to amend must contemplate the removal of all the objections to the bond, or the refusal to allow amendment will not be error. Therefore, where the bond was without seals to the names of the principal and surety, and the principal asked leave to affix a seal to his own name, which was refused; and the attachment was quashed for want of sufficient bond; it was held not to be error, because, if the seal had been affixed to his name, the bond would still have been insufficient, from the want of a seal to that of the surety.[5]

§ 148 *a*. When a plaintiff has obtained leave to file an amended bond, and has done so, it is substituted for that originally given, and has the effect of sustaining the attachment from the commencement of the action, and is to be treated as the defendant's security from that time.[6]

[1] Van Arsdale *v.* Krum, 9 Missouri, 397. See Bergman *v.* Sells, 39 Arkansas, 97.

[2] Lowry *v.* Stowe, 7 Porter, 483.

[3] Planters & Merchants Bank *v.* Andrews, 8 Porter, 404; Lowe *v.* Derrick, 9 Ibid. 415; Scott *v.* Macy, 3 Alabama, 250; Lea *v.* Vail, 3 Illinois (2 Scammon), 473; Tevis *v.* Hughes, 10 Missouri, 380; Wood *v.* Squires, 28 Ibid. 528; Beardslee *v.* Morgan, 29 Ibid. 471; Henderson *v.* Drace, 30 Ibid. 358; McDonald *v.* Fist, 53 Ibid. 343; Oliver *v.* Wilson, 29 Georgia, 642; Irvin *v.* Howard, 37 Ibid. 18; Pierse *v.* Miles, 5 Montana, 549.

[4] Jackson *v.* Stanley, 2 Alabama, 326; Conklin *v.* Harris, 5 Ibid. 213; Jasper County *v.* Chenault, 38 Missouri, 357.

[5] Hunter *v.* Ladd, 2 Illinois (1 Scammon), 551.

[6] Branch of State Bank *v.* Morris, 13 Iowa, 136.

§ 149. Where the plaintiff needs the testimony of a surety in his bond, he will be allowed, if no liability on the bond has already accrued, to substitute a new surety.[1]

§ 150. The errors and defects of attachment bonds, however they might affect the attachment suit, do not impair the liability of the obligors to the defendant. Upon them the obligation continues, though the attachment might have been quashed because of the insufficiency of the instrument, either as to amount, terms, or the time of its execution. Thus, though a bond be not taken until after the writ is issued, — which we have seen is a proper ground for quashing the writ,[2] — the obligors cannot set up that fact as a defence to an action on the instrument.[3] But if it be not given till after the suit is dismissed, it is wholly void.[4] And the omission from a bond of a part of the required condition does not invalidate it as against the obligors, but, to the extent it goes, it is valid.[5]

§ 151. Where a bond is executed without being required or authorized by any statute, the makers cannot defend against it on that ground; it is good as a common-law bond. This was ruled in an action on a bond, given by a plaintiff on commencing a suit by attachment in a Circuit Court of the United States, and the bond was made to the United States. No law of the United States requiring it, and not being executed in connection with any business of, or any duty of the obligors to, the government, it was contended that it could not be enforced; but the court determined otherwise.[6] So, if the bond be in favor of the defendant when the law required it to be in favor of the State.[7] So, if the law require the bond to be approved by the court, but it be approved by a judge in vacation, it is not therefore void, but is good as a common-law bond.[8]

§ 152. The bond is not confined, in its obligation, to the proceedings in the court in which the attachment suit was instituted, but extends on to the final determination of the cause. Where the condition was "to pay the defendant all damages and

[1] Tyson *v.* Lansing, 10 Louisiana, 444.
[2] *Ante*, § 121.
[3] Sumpter *v.* Wilson, 1 Indiana, 144.
[4] Benedict *v.* Bray, 2 California, 251.
[5] Hibbs *v.* Blair, 14 Penn. State, 413; State *v.* Berry, 12 Missouri, 376.
[6] Barnes *v.* Webster, 16 Missouri, 258; Sheppard *v.* Collins, 12 Iowa, 570; Cunningham *v.* Jacobs, 120 Indiana, 306.
[7] McLuckie *v.* Williams, 68 Maryland, 262.
[8] Williams *v.* Coleman, 49 Missouri, 325.

costs which he may sustain by reason of the issuing of the attachment if the plaintiff fail to recover judgment thereon," the plaintiff recovered judgment in the court in which the suit was brought, and the defendant appealed therefrom, and in the appellate court the judgment was reversed. When sued on the bond, the obligor urged that the condition was not broken, inasmuch as he had recovered judgment in the court in which the suit was brought; but this view was not sustained; the court considering that the bond was not restricted to that court, but extended to the final result of the case.[1]

§ 153. *Actions on Attachment Bonds.* Approaching now the subject of actions on these bonds, the inquiry arises, What is the legislative intention in requiring such bonds to be given? Is it that they shall supersede the common-law action for malicious prosecution? If so, the defendant in the attachment can maintain no action, save on the bond. If not, then the bond must be intended, either as a mere security for what may be recovered in an action for malicious prosecution, or as authorizing a recovery of damages for a wrongful attachment, on other principles than those established by the common law in actions for malicious prosecution.

§ 154. On the first point, it has been uniformly decided, that the remedy of the attachment debtor for a wrongful attachment, by an action for malicious prosecution, is not affected by the execution of the bond, but that that remedy still subsists.[2]

§ 155. On the second point, it seems clear that the bond is not intended as a mere security for the payment of what may be recovered in an action for malicious prosecution; for if so intended, it should be conditioned for the payment of the damages which the defendant may sustain by reason of the attachment having been sued out maliciously and without probable cause; but such are never the terms used. Again, the penalty is always in a prescribed sum, which in many cases would be much less than the amount that might be recovered in an action for malicious prosecution. And again, if so intended, no action could

[1] Ball *v.* Gardner, 21 Wendell, 270; Bennett *v.* Brown, 20 New York, 99.

[2] Sanders *v.* Hughes, 2 Brevard, 495; Donnell *v.* Jones, 13 Alabama, 490; Smith *v.* Story, 4 Humphreys, 169; Pettit *v.* Mercer, 8 B. Monroe, 51; Senecal *v.* Smith, 9 Robinson (La.), 418; Smith *v.* Eakin, 2 Sneed, 456; Bruce *v.* Coleman, 1 Handy, 515; Sledge *v.* McLaren, 29 Georgia, 64; Churchill *v.* Abraham, 22 Illinois, 455.

properly be maintained upon it, until the damages had been liquidated and determined in an action for malicious prosecution; whereas, it is a constant practice to sue in the first instance on the bond, and has been repeatedly decided to be admissible.[1] Hence we apprehend that the bond is not intended merely as a security for damages recoverable in an action for malicious prosecution; and that in requiring such bonds, it is intended to authorize the recovery of other than such damages; and that a recovery on them is not restricted to that authorized by the principles of the common law governing actions for malicious prosecution.

§ 156. This subject was discussed by the Court of Appeals of Kentucky, in a case where the condition of the bond was "for the payment of all costs and damages sustained by the defendant by reason of the wrongful issuing of the order for the attachment;" and the court said "If an order has been obtained without just cause, and an attachment has been issued, and acted on in pursuance of the order, the terms of the bond secure to the defendant in the attachment all costs and damages that he has sustained in consequence thereof. The condition of the bond is satisfied, and its terms substantially complied with, by securing to him damages adequate to the injury to the property attached, and the loss arising from the deprivation of its use, together with the actual costs and expenses incurred.

"It cannot be rationally presumed that the legislature designed to impose on the security in the bond a more extensive liability. The statute is remedial in its character, and should be expounded so as to advance the object contemplated. To impose an almost unlimited liability on the security in the bond, sufficient to embrace every possible injury that the defendants might sustain, would be in effect to defeat in a great measure the object of the statute, by rendering it difficult, if not impracticable, for the plaintiff to execute the necessary bond."[2]

§ 157 The introduction of attachment bonds in Alabama led to a change in the common-law principles which would otherwise have regulated the action for a wrongful attachment. The first

[1] *Post*, § 166.

[2] Pettit *v.* Mercer, 8 B. Monroe, 51. See Bruce *v.* Coleman, 1 Handy, 515. In Georgia, where the bond is for the payment of "all damages which may be recovered against the plaintiff" for suing out the attachment, it is held to be only security for the payment of such damages as may be recovered in an action for malicious attachment. Sledge *v.* McLaren, 29 Georgia, 64.

reported decision there on this subject was in an *action on the case;* in which the declaration charged that the defendant, without any just or probable cause, procured an attachment to be issued and levied on the plaintiff's property. This, as a declaration for malicious prosecution, was at the common law manifestly insufficient. Plea, not guilty and issue. On the trial, the Circuit Court charged the jury that in this action it was essential to prove malice. This view was overruled by the Supreme Court; its decision manifestly resting on the existence of the law requiring a bond to be given, though the action was not on the bond. That law was considered as changing the common-law rule in such cases.[1]

The next was also an action on the case for suing out an attachment without any reasonable or probable cause, and for the purpose of vexing and harassing the plaintiff. The Supreme Court again held, that the expression of the legislative will, in designating the terms of the bond, indicated that the mere wrongful recourse to this process was a sufficient cause of action, and that malice was important only in connection with the question of damages.[2]

The same court held, that actions on attachment bonds are governed in all respects by the rule they had established as applicable to actions on the case, except the recovery, which could not exceed the penalty of the bond.[3] This rule was expressed in these words: "Whenever an attachment is wrongfully sued out, and damage is thereby caused to the defendant in the suit, he is entitled, by force of the statutory provision, to recover for the actual injury sustained. And if, in addition to its being wrongfully sued out, it is also vexatiously, or in other terms, maliciously sued, then the defendant, upon the principle which governs the correlative action for a malicious prosecution, may recover damages as a compensation for the vexatious or malicious act; or, in the terms of the statute, such damages as he may be entitled to on account of the vexatious suit."[4]

§ 158. In Louisiana, the same views as those entertained in Alabama have been expressed, as well in actions on attachment bonds, as in those which, as reported, do not appear to be of that

[1] Wilson *v.* Outlaw, Minor, 367; Kirksey *v.* Jones, 7 Alabama, 622.

[2] Kirksey *v.* Jones, 7 Alabama, 622; Seay *v.* Greenwood, 21 Ibid. 491.

[3] Hill *v.* Rushing, 4 Alabama, 212; McCullough *v.* Walton, 11 Ibid. 492.

[4] Kirksey *v.* Jones, 7 Alabama, 622; McCullough *v.* Walton, 11 Ibid. 492; Donnell *v.* Jones, 13 Ibid. 490; Sharpe *v.* Hunter, 16 Ibid. 765; Floyd *v.* Hamilton, 33 Ibid. 235; Pounds *v.* Hamner, 57 Ibid. 342; Jackson *v.* Smith, 75 Ibid. 97.

character. There, the bond is, "for the payment of such damages as the defendant may recover, in case it should be decided that the attachment was wrongfully issued." While the common-law principles governing actions for malicious prosecution are there fully recognized and affirmed,[1] it is held, that where no malice exists, the actual damage sustained may be allowed: if malice exists, vindictive damages may be recovered.[2] And so in Kansas,[3] and Texas.[4]

§ 159. In Missouri, where the condition of the bond was "for the prosecution of the suit without delay and with effect, and the payment of all damages which should accrue to the defendant or any garnishee, in consequence of the attachment," the principles of the common law in regard to actions for malicious prosecution have not been applied to actions on these bonds, but on the contrary the recovery of actual damages was allowed in a case presenting no ingredient of malice.[5] And so in New York,[6] and in Ohio.[7]

§ 160. In Tennessee, however, where the bond is conditioned "for satisfying all costs which shall be awarded to the defendant, in case the plaintiff shall be cast in the suit, and also all damages which shall be recovered against the plaintiff in any suit which may be brought against him, for wrongfully suing out the attachment," it was decided, in an action on the case for a wrongful attachment, that the principles of the common law remained unchanged;[8] and that in an action on the bond, a recovery might be had, not only for such damages as are properly recoverable in the common-law action, but likewise for other damages, upon grounds contemplated by the statute, and not embraced by the principles governing the action on the case.[9] In this State, in order to recover under the bond damages for a malicious attachment, such as are recoverable in the common-law action, it is necessary in the declaration to aver malice in the suing out and levy of the attachment.[10]

[1] Seneeal v. Smith, 9 Robinson (La.), 418; Grant v. Deuel, 3 Ibid. 17.

[2] Cox v. Robinson, 2 Robinson (La.), 313; Offutt v. Edwards, 9 Ibid. 90; Horn v. Bayard, 11 Ibid. 259; Littlejohn v. Wilcox, 2 Louisiana Annual, 620; Moore v. Withenburg, 13 Ibid. 22.

[3] McLaughlin v. Davis, 14 Kansas, 168.

[4] Reed v. Samuels, 22 Texas, 114; Hughes v. Brooks, 36 Ibid. 379.

[5] Hayden v. Sample, 10 Missouri, 215.

[6] Dunning v. Humphrey, 24 Wendell, 31; Winser v. Orcutt, 11 Paige, 578.

[7] Bruce v. Coleman, 1 Handy, 515.

[8] Smith v. Story, 4 Humphreys, 169.

[9] Smith v. Eakin, 2 Sneed, 456.

[10] Doll v. Cooper, 9 Lea, 576.

§ 160 *a*. In South Carolina, in an action on a bond conditioned "for the payment to the defendant of all damages, costs, and charges which might accrue to him by reason of the issuing and obtaining the writ of attachment, and all damages consequent to him from any illegality in obtaining and suing out the same," it was held, that the plaintiff could not recover punitive damages, but only the amount he had been injured by the illegal seizure of his property under the attachment.[1] In Pennsylvania, the bond is for the payment of "all legal costs and damages which the defendant may sustain by reason of the attachment;" and there it is held, that the bond was designed to cover such injury as the defendant suffered where the plaintiff failed to sustain the attachment; but not the damage inflicted by the malicious use of the process.[2]

§ 161. From this summary of the views of different courts on this subject, it is apparent that the execution of a cautionary bond by an attachment plaintiff, modifies the common-law rule, and gives the defendant recourse against the plaintiff on the bond, for a wrongful attachment, where there existed no malice in suing it out. The practical working of this rule will be presently exhibited, in connection with the question of damages.

§ 161 *a*. In some States the statute authorizes the defendant to set up in the attachment suit a counterclaim for the wrongful suing out and service of the attachment; but unless there be such a statute this is inadmissible.[3]

§ 162. The only party who can maintain an action on an attachment bond is the defendant; and the existence of any right of action thereon depends on whether his property has been attached. If the writ was not levied, he has no recourse on the bond; but if it was levied, his right of action accrues as well when the attachment is dissolved by the plaintiff's voluntary abandonment of it, as when that result follows judicial action.[4] The bond is not required for the protection of the officer executing the attachment, nor for the indemnification of a third party whose property may be wrongfully attached, but simply for the

[1] McClendon *v.* Wells, 20 South Carolina, 514.

[2] Dyer *v.* Sharp, 2 Penn. County Ct. 216.

[3] Atkins *v.* Swope, 38 Arkansas, 528.

[4] Cox *v.* Robinson, 2 Robinson (La.), 313; Penniman *v.* Richardson, 3 Louisiana, 101; Steinhardt *v.* Leman, 41 Louisiana Annual, 835.

benefit of the party against whom the writ issues. This was so held in Virginia, where the condition of the bond was "to pay all costs and damages which may be awarded against the plaintiff, or sustained by *any person*, by reason of his suing out the attachment." [1] And so in Louisiana,[2] West Virginia,[3] Indiana,[4] and Iowa.[5]

The defendant's right of action on the bond, so far as it relates to compensation for injuring, detaining, or converting the property attached, passes to his assignee in bankruptcy; but not so his right to recover compensation for injury to his business, reputation, and credit, and vindictive damages based on the falsity or *mala fides* of the claim, wanton abuse of the process, or express malice in suing out and levying it.[6]

An assignee of a firm for the benefit of their creditors cannot maintain an action on an attachment bond, to recover expenses incurred and paid by such assignee in successfully defending an attachment suit against one member of the firm.[7]

§ 162 *a*. Where the bond is to pay all damages sustained "by reason of *the attachment*, if the order is wrongfully obtained," no action will lie on it until the attachment shall have been discharged, and such final disposition of it must be alleged.[8] But where the bond is conditioned that "the plaintiff shall prosecute his *action* without delay and with effect, and pay all damages and costs that may accrue to the defendant by reason of the attachment," the right of action on the bond does not accrue until not merely the attachment, but the suit in which it was obtained, shall have been finally disposed of adversely to the plaintiff.[9] And so where the condition of the bond is, "that if the plaintiff shall fail to prosecute the *action* commenced by said attachment with effect," etc.[10] But where the attachment proceedings are *ex parte*, the right of action on the bond does not depend on the attachment having been discharged; but it may be sued on after judgment obtained on publication; and that judgment will not preclude the defendant therein from showing that the attachment

[1] Davis *v.* Commonwealth, 13 Grattan, 139.

[2] Raspillier *v.* Brownson, 7 Louisiana, 231; Edwards *v.* Turner, 6 Robinson (La.), 382.

[3] Mitchell *v.* Chancellor, 14 West Virginia, 22.

[4] Faulkner *v.* Brigel, 101 Indiana, 329.

[5] Mason *v.* Rice, 66 Iowa, 174.

[6] Doll *v.* Cooper, 9 Lea, 576.

[7] Weir *v.* Dustin, 32 Illinois Appellate, 388.

[8] Nolle *v.* Thompson, 3 Metcalfe (Ky.), 121; Eckman *v.* Hammond, 27 Nebraska, 611.

[9] State *v.* Williams, 48 Missouri, 210.

[10] Harbert *v.* Gormley, 115 Penn. State, 237.

was wrongfully obtained, because the claim on which it was issued was false and unjust.[1]

Where, as shown in the next section to be the case in Ohio, when there are several defendants in the attachment, a suit may be maintained on the bond by those against whom the attachment was wrongfully obtained, without joining those against whom it was rightfully obtained, it is not necessary, in a suit by the former on the bond, to aver or prove that the attachment had been discharged as to the latter.[2]

§ 163. Where there are several defendants, and a bond in favor of them all, it was held in Alabama, that the action on the bond must be in the name of all, though the attachment was levied on the separate property of each, in which they had not a joint interest. How the damages are to be divided between the obligees in the bond, is a matter with which the obligors have no concern, as they will be protected by a recovery in the names of all the obligees, from another action, by all or either.[3] In Ohio, however, it was held, that a right of action accrues to those defendants who were injured by the wrongful attachment, and that it is not necessary that the defendants against whom the attachment was rightfully obtained should be joined either as plaintiffs or defendants.[4]

§ 164. It is not requisite, in order to enable the party injured to maintain a suit on the bond, that he should obtain an order of the court in which the bond was filed, to deliver it to him for suit.[5]

§ 165. The sureties in the bond can be subjected to liability only in reference to the particular writ for obtaining which it was given. This was decided in Louisiana, upon the following case: A. sued out an attachment, and gave bond. The attachment was not executed, and some time afterward A. voluntarily abandoned it, and took out another, without giving any new bond. It was held, that the liability of the surety on the bond extended only to the time of the abandonment of the first writ, and could not be revived without his consent.[6]

[1] Bliss v. Heasty, 61 Illinois, 338.
[2] Alexander v. Jacoby, 23 Ohio State, 358.
[3] Boyd v. Martin, 10 Alabama, 700; Masterson v. Phinizy, 56 Ibid. 386.
[4] Alexander v. Jacoby, 23 Ohio State, 358. See Renkert v. Elliott, 11 Lea, 235.
[5] Bruce v. Coleman, 1 Handy, 515.
[6] Erwin v. Com. & R. R. Bank, 12 Robinson (La.), 227.

§ 165 *a*. The sureties to an undertaking by which they covenant to pay all costs and damages which may be awarded to or sustained by the defendants, not exceeding a sum specified, are entitled to the benefit of all payments for costs or damages made by their principal, and cannot be held liable for more than the difference between the amount so paid by him and the sum specified in the undertaking.[1]

§ 166. The question arises, whether, in order to maintain an action on the bond, the damages must first be recovered in a distinct action. This is not believed to be requisite; and it was so decided in Virginia, where the bond is to pay "all such costs and damages as may accrue for wrongfully suing out the attachment;"[2] in Alabama, where it is to pay "all such costs and damages as he might sustain by the wrongful or vexatious suing out of the attachment;"[3] in Arkansas, where it is to pay "all damages the defendant may sustain by reason of this action, if the order therefor is wrongfully obtained;"[4] in Tennessee, where it is to pay "all damages which shall be recovered against the plaintiff in any suit which may be brought against him, for wrongfully suing out the attachment;"[5] in Ohio, where it is "to pay all damages which the defendant may sustain by reason of the attachment, if the order therefor be wrongfully obtained;"[6] and in Illinois, where it is "to pay and satisfy the defendant all such costs and damages as shall be awarded against the plaintiff in any suit which may hereafter be brought for wrongfully suing out the attachment."[7] The Supreme Court of Georgia, however, took a different view, where the bond was to pay "all damages which may be recovered against the said plaintiff for suing out the attachment;" terms almost the same as those in the Tennessee bond.[8] And in Mississippi, where the bond was "to pay and satisfy the defendant all such costs and damages as shall be awarded against him in any suit which may be hereafter brought for wrongfully suing out the attachment," it was held, that suit must first be brought against the principal in the bond, and that an action thereon against the sureties can only be maintained in the event of his failure to pay the costs and

[1] Baere *v.* Armstrong, 33 New York Supreme Ct. 19.

[2] Dickinson *v.* McGraw, 4 Randolph, 158.

[3] Herndon *v.* Forney, 4 Alabama, 243.

[4] Boatwright *v.* Stewart, 37 Arkansas, 614.

[5] Smith *v.* Eakin, 2 Sneed, 456.

[6] Bruce *v.* Coleman, 1 Handy, 515.

[7] Churchill *v.* Abraham, 22 Illinois, 455.

[8] Sledge *v.* Lee, 19 Georgia, 411.

damages recovered against him in such suit.[1] And so in Colorado and Maryland, where the terms of the bond are the same as in Mississippi.[2]

§ 166 *a*. Where the suit may be maintained on the bond, without previous recovery of damages in a distinct action, the sureties may be sued jointly with the principal.[3] If the defendant sue the principal alone, and recover damages for the wrongful issue of the attachment, the surety cannot be made liable upon that judgment; for he was not a party to it.[4]

§ 167. Debt is undoubtedly the proper form of action on attachment bonds; but it has been held that covenant will lie.[5] In assigning breaches, it is not sufficient merely to negative the terms of the condition. The declaration must show that the attachment was wrongfully sued out, and what damages the plaintiff has sustained. Therefore, where the condition was, that the plaintiff should prosecute his attachment to effect, and pay and satisfy the defendant all such costs and damages as he might sustain by the wrongful or vexatious suing out of such attachment; and the breach assigned was that he did not prosecute his attachment to effect, nor pay the costs, damages, &c., which the defendant sustained by the wrongful and vexatious suing out of the attachment, by means whereof the said bond became forfeited, and the attachment plaintiff liable to pay the penalty; the declaration was held bad on demurrer.[6]

§ 168. In assigning breaches, if the damages alleged to have been sustained exceed the amount of the penalty, it is proper to assign the non-payment of the penalty. Where the damages claimed do not equal the penalty, the averment should be that they have not been paid.[7] A declaration which fails to aver the non-payment of the damages sustained is bad on demurrer.[8]

§ 169. A recital in the condition of the bond, that the plain-

[1] Holcomb *v.* Foxworth, 34 Mississippi, 265.

[2] Sterling City Mining Co. *v.* Cook, 2 Colorado, 24; Sterling City Mining Co. *v.* Hughes, 3 Ibid. 229; McLuckie *v.* Williams, 68 Maryland, 262.

[3] Jennings *v.* Joiner, 1 Coldwell, 645.

[4] Bunt *v.* Rheum, 52 Iowa, 619.

[5] Hill *v.* Rushing, 4 Alabama, 212.

[6] Flanagan *v.* Gilchrist, 8 Alabama, 620. See Winsor *v.* Orcutt, 11 Paige; 578; Love *v.* Kidwell, 4 Blackford, 553, Steen *v.* Ross, 22 Florida, 480.

[7] Hill *v.* Rushing, 4 Alabama, 212.

[8] Michael *v.* Thomas, 27 Indiana, 501; Uhrig *v.* Sinex, 32 Ibid. 493; Ryder *v.* Thomas, 32 Iowa, 56; Horner *v.* Harrison, 37 Ibid. 378; Pinney *v.* Hershfield, 1 Montana, 367.

tiff had issued a writ of attachment against the defendant, estops the obligors from denying by plea that the attachment was sued out, and such a plea is bad on general demurrer.[1]

§ 170. Under what circumstances may the attachment defendant maintain an action on the bond? Does the mere failure of the plaintiff to prosecute his suit work a forfeiture of the condition? The Supreme Court of Louisiana has gone very far in giving recourse on the bond in such case. There, it will be remembered, the obligation is "for the payment of such damages as the defendant may recover, in case it should be decided that the attachment was *wrongfully obtained;*" and it is held, that if a plaintiff voluntarily abandons his attachment, he renders himself and his surety responsible in damages.[2] The same court, with less apparent reason, has gone further, and decided that, though it appear that the plaintiff had at the commencement of his suit a sufficient and very probable cause of action, and was prevented from getting a judgment by some technical objection or irregularity in the proceedings, which could not be foreseen, the defendant may nevertheless hold him liable for the damages he actually sustained; and that, if an attachment be set aside by order of the court, it is *prima facie* evidence that it was wrongfully obtained.[3] A decision was once given, that would seem to exempt the *surety* in such a case from liability;[4] but this doctrine was held inapplicable to the plaintiff.[5] As, in that State, the defendant's claim on the bond for damages undoubtedly rests on its being decided that the attachment was "*wrongfully obtained,*" it is difficult to see upon what principle the plaintiff can be charged, when it is admitted that the attachment was *rightfully* obtained, but he failed to obtain a judgment, for technical reasons having no connection with the merits of the action or the cause for attachment.

The Supreme Court of Alabama took a different view of the subject, and one more consonant with sound reason. In an action on an attachment bond, the condition of which was, "that the plaintiff should prosecute his attachment to effect, and pay the defendant all such costs and damages as he may sustain by the wrongful or vexatious suing out the attachment," it ap-

[1] Love v. Kidwell, 4 Blackford, 553.

[2] Cox v. Robinson, 2 Robinson (La.), 313. See Penniman v. Richardson, 3 Louisiana, 101.

[3] Cox v. Robinson, 2 Robinson (La.), 313.

[4] Garretson v. Zacharie, 8 Martin, N. s. 481.

[5] Cox v. Robinson, 2 Robinson (La.), 313.

peared that in the attachment suit, the defendant, by a plea in abatement, caused the attachment to be quashed, for informality in the affidavit upon which it issued, and then sued the plaintiff for damages. On the trial of this suit for damages, it was shown that there were good grounds for the attachment, though not sufficiently set out in the affidavit. The court charged the jury, that if they believed the attachment was sued out, and was abated on plea, the plaintiff was entitled to recover the actual damage he had sustained. The Supreme Court held this instruction to be wrong, and observed: "We think that by the wrongful suing out of the attachment is meant, not the omissions, irregularities, or informalities which the officer issuing the process may have committed in its issuance, but that the party resorted to it without sufficient ground."[1] In other words, that the resort to it was an unlawful act.[2]

In Arkansas, the bond was "for all damages the defendant may sustain by reason of this action, if the order therefor is wrongfully obtained;" and it was there held, that the dissolution of the attachment for informality in the affidavit was not sufficient proof that the attachment was wrongfully obtained.[3]

In Kentucky, where the bond was conditioned "for the payment of all costs and damages sustained by the defendant by reason of the wrongful issuing of the order for an attachment," — terms, in substance, equivalent to those of the Louisiana bond, — it was held, that a mere failure to prosecute the suit does not give an action on the bond. The order must have been procured wrongfully and without just cause, to constitute a breach of the condition, although the plaintiff may have abandoned the prosecution of the suit.[4] And so in Iowa.[5]

In Tennessee, the condition of the bond is, "for satisfying all costs which shall be awarded to the defendant, in case the plain-

[1] Sharpe *v.* Hunter, 16 Alabama, 765; City National Bank *v.* Jeffries, 73 Ibid. 183. See Eaton *v.* Bartscherer, 5 Nebraska, 469.

[2] Calhoun *v.* Hannan, 87 Alabama, 277.

[3] Boatwright *v.* Stewart, 37 Arkansas, 614.

[4] Pettitt *v.* Mercer, 8 B. Monroe, 51. In that State this case occurred: A. sued B. by attachment, and when the case had been several years pending, the office of the clerk of the court, and the record in the case, were destroyed by fire. Afterwards, the court ordered the plaintiff to supply the burnt record or submit to a nonsuit. He could not supply a complete record, and thereupon his petition was dismissed, and his attachment "discharged without prejudice." He was then sued on the bond given to obtain the attachment. It was held, that the order of discharge of the attachment *without prejudice* was, under the circumstances, no evidence that the attachment was wrongful or even hurtful, but rather implied the contrary. Cooper *v.* Hill, 3 Bush, 219.

[5] Nockles *v.* Eggspieler, 47 Iowa, 400.

tiff shall be cast in the suit, and also all damages which shall be recovered against the plaintiff in any suit or suits which may be brought against him for wrongfully suing out the attachment;" and it has been there decided, that mere want of success does not *per se* subject the plaintiff to an action,[1] and that the burden is on the defendant to show that he has sustained damage; and if no evidence to that point be given, no damages can be recovered.[2]

In Florida, the condition of the bond is "to pay to the defendant all costs and damages he may sustain in consequence of improperly suing out the attachment;" and it is there held, that to allege that it was determined by the court that the writ was improperly issued, was not sufficient to sustain an action on the bond; but that the breach should state with distinctness in what its impropriety consisted. Said the court: "It is only improperly issued when the plaintiff has no meritorious cause of action, of that class of actions in which the law authorizes a resort to the remedy against the defendant, or having such a cause of action the ground alleged in the affidavit for its issue is untrue, or not one of the grounds enumerated which must exist before it can be obtained. We do not think it was intended to cover a case where the plaintiff had a meritorious cause of action, and when the cause for issuing an attachment is one of those specified in the statute, and is true; but the attachment was dissolved for some irregularity or for some technical reason."[3]

In Missouri, where the condition of the bond is "that the plaintiff shall prosecute his action without delay and with effect, . . . and pay all damages and costs that may accrue to any defendant or garnishee, by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon;" a judgment *on the merits* for the defendant, in the attachment suit, will authorize a suit on the bond, though he did not put in issue the truth of the affidavit on which the attachment issued.[4] And so, where the defendant gives special bail dissolving the attachment, and the plaintiff dismisses the action.[5]

In Indiana, views have been expressed on this subject, such as have not been elsewhere. There the bond or "undertaking" is that the plaintiff "shall duly prosecute his proceeding in attach-

[1] Smith *v.* Story, 4 Humphreys, 169.
[2] Ranning *v.* Reeves, 2 Tennessee Ch'y, 263.
[3] Steen *v.* Ross, 22 Florida, 480.
[4] State *v.* Beldsmeier, 56 Missouri, 226.
[5] State *v.* O'Neill, 4 Missouri Appeal, 221.

ment, and pay all damages which may be sustained by the defendant, if the proceedings of the plaintiff shall be wrongful and oppressive;" and the law declares that "a defendant shall be entitled to an action on the undertaking . . . if it shall appear that the proceedings were wrongful and oppressive." In an action of this kind, it appeared that the attachment suit was determined in favor of the defendant, but without his putting in issue the truth of the affidavit, and without any finding by the court on that point. It was held, that the right of action existed, notwithstanding there had been no such issue or finding. And the court went farther, though the point was not involved in the case, and expressed the opinion that an action on the undertaking might be maintained, if the attachment proceedings were wrongful and oppressive, though there had been judgment *for the plaintiff* in the attachment suit.[1] This would seem to have been intended to apply only to a case where there had been no contest over the affidavit; for at the same term the court said that where both the main action and the attachment are sustained, — which, of course, implies a contest on both, — there can be no suit on the undertaking.[2]

In Kansas, the allowance of a motion to vacate and discharge the attachment, because the allegations in the affidavit therefor were untrue, is conclusive, and authorizes a recovery on the bond,[3] before the final determination of the suit in which the attachment issued.[4]

§ 170 *a*. When sued on the bond, where there has been no previous trial and determination of the rightfulness of the plaintiff's act in suing out the attachment, the question arises whether, in justifying that act, he is confined to matters known to him when the attachment was obtained, or may also show facts which were not then known to him, but which go to prove that the grounds alleged by him for obtaining it were in fact true. In an action for malicious prosecution, as appears elsewhere,[5] probable cause cannot be established by showing facts of which the plaintiff had no knowledge when he sued out the writ; but in Iowa, it has been held otherwise, in suits on attachment bonds, whose obligation is "to pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment." In that State, to obtain an attachment, the plaintiff

[1] Harper *v.* Keys, 43 Indiana, 220.
[2] Wilson *v.* Root, 43 Indiana, 486.
[3] Hoge *v.* Norton, 22 Kansas, 374.
[4] Kerr *v.* Reece, 27 Kansas, 469.
[5] *Post*, § 732 *a*.

swears that he verily believes that the defendant is doing or has done that which will justify the attachment. It was there held, at first, that the true issue in an action on the bond is whether the plaintiff had sufficient cause for believing as he alleged; and that if the belief appears to have been without foundation or verity, the attachment was wrongful.[1] Afterwards the court said: "The question, under our statute, is not whether the facts were actually true, upon which the attaching plaintiff bases his affidavit for a writ, but had he, exercising that degree of caution that a reasonably prudent man should, good cause to believe that which he had stated as true."[2] There would be more foundation for this view if the statute, as in some States, required the plaintiff to aver that he had good reason to believe and did believe the existence of the facts alleged in the affidavit for obtaining the attachment; but even in that case, as elsewhere appears,[3] a plea traversing the affidavit does not put in issue the plaintiff's belief, nor the goodness of the reasons for his belief, but the truth of the facts charged. It is not, therefore, surprising that the Iowa court should have subsequently reconsidered and changed its conclusions. The rule there now is, that if the plaintiff had good cause to believe the grounds for attachment true, or if they were true in fact, the suing out of the attachment was not wrongful.[4] In that State, where an attachment was obtained on the allegation that "the defendant was about to dispose of his property with intent to defraud his creditors, and was about to convert his property into money for the purpose of placing it beyond the reach of his creditors;" in an action against the attachment plaintiff for wrongful attachment, it was held, that if he had reasonable grounds to believe the allegations upon which the writ issued, the action could not be maintained; and that it was error for the court to instruct the jury that the grounds of his belief should have been such "as to lead a reasonably prudent man to act *in matters of highest moment to himself*."[5] And in the same State, where an attachment was obtained on the ground that the "defendant had disposed of his property in whole or in part with intent to defraud his creditors;" and the defendant brought an action against the attachment plaintiff for wrongfully suing out the attachment; it was held, that it was error for the court to instruct the jury that if the defendant *had not so disposed of his*

[1] Winchester *v.* Cox, 4 G. Greene, 121; Mahnke *v.* Damon, 3 Iowa, 107.

[2] Burton *v.* Knapp, 14 Iowa, 196; Nordhaus *v.* Peterson, 54 Ibid. 68.

[3] *Post*, § 409.

[4] Vorse *v.* Phillips, 37 Iowa, 428.

[5] Carey *v.* Gunnison, 51 Iowa, 202.

property he was entitled to recover; and that to justify a recovery on the attachment bond it must appear not only that the ground alleged for suing out the attachment did not exist, but that the attachment plaintiff had no reasonable cause to believe that it existed.[1]

§ 170 *b*. In connection with the matter of action on the bond comes the question whether the attachment defendant may set up, by way of set-off or counter-claim, against the plaintiff's action, a claim under the bond for damages for a wrongful attachment. In some States this is expressly authorized by statute; but where not so authorized can it be done? This must depend on the statute of set-off in each State. As a general proposition, unliquidated damages cannot be set off; but where the statutory terms allow it, there would seem to be no good reason why that recourse should be denied to the defendant in a wrongful attachment. In Pennsylvania unliquidated damages may be set off, where they arise *ex contractu*, and are capable of liquidation by any known legal standard;[2] and there, under a bond conditioned for the payment to the defendant of all legal costs and damages which he might sustain by reason of the attachment if the plaintiff fail to prosecute the attachment with effect, it is held, that the defendant may set off against the plaintiff's action the damages he sustained by the wrongful attachment; and the court said: "After the giving of the bond in the attachment proceeding, the seizure of the defendant's goods was not a tort, but a perfectly lawful act. If any damages resulted therefrom to the defendant, the plaintiff was bound by his contract, to wit, the bond, to pay the amount thereof to the defendant. The defendant, in order to recover those damages, would necessarily be obliged to bring an action on the bond. This being so, it is perfectly clear that his right of action against the plaintiff is not for damages for a trespass, but damages for breach of the condition of the bond. The right is *ex contractu* and not *ex delicto*. While it is true the damages are unliquidated, they are capable of liquidation by proof, and therefore the right to set them off in this action comes clearly within the adjudicated cases."[3]

§ 171. In an action on the bond, where, in the attachment suit, the proceedings were entirely *ex parte*, it is not sufficient

[1] Nordhaus *v.* Peterson, 54 Iowa, 68.
[2] Hunt *v.* Gilmore, 59 Penn. State, 450; Halfpenny *v.* Bell, 82 Ibid. 128.
[3] Plunkett *v.* Sauer, 101 Penn. State, 356.

merely to assign, as a breach of the condition, that the defendant did not owe the debt for which the attachment was sued out; he must set forth the proceedings under the attachment, and show that a judgment was given against him, and his property used to satisfy it; that he did not owe the debt; and that the attachment and judgment were illegal.[1]

§ 172. Where the cases in which an original attachment may issue are different from those authorizing an auxiliary or ancillary attachment, — a writ taken out in aid of a pending suit instituted by summons, — and the plaintiff in an *original* attachment is sued on his bond, he cannot, as a defence thereto, show that, when he obtained the attachment, facts existed which, under the law, would have justified an *ancillary* attachment.[2] And so, where the statute authorizes the issue of attachments of different kinds, and for distinct purposes, in different classes of cases, when resort is had to the process in one class, it is wrongfully sued out if neither of the grounds prescribed by the statute on which the process may issue in that particular class exists, though a statutory cause for issuing the writ in some other class may be shown.[3]

§ 173. Where an attaching plaintiff complies with all the requirements of the law in procuring an attachment, the presumption is, that it is rightfully sued out; and if the defendant, in an action on the bond, claims that it was wrongfully done, the burden is upon him to establish that fact.[4] Not that he must necessarily do it by positive testimony; but it may be shown by proof of such facts and circumstances as tend to establish the wrongful character of the act.[5] The failure of the attaching plaintiff to sustain his action is undoubtedly *prima facie* evidence in support of the defendant's action on the bond; but it is not conclusive proof that the attachment was either wrongfully obtained, in the sense of being merely obtained without sufficient cause, though without malice,[6] or that the attachment plaintiff acted wilfully wrong, that is maliciously, in suing it out.[7] The latter position will undoubtedly hold good in all cases, without regard to the particular manner in which the attachment suit was

[1] Hoshaw *v.* Hoshaw, 8 Blackford, 258.

[2] Reynolds *v.* Culbreath, 14 Alabama, 581.

[3] Baxley *v.* Segrest, 35 Alabama, 183.

[4] Calhoun *v.* Hannan, 37 Alabama, 277.

[5] Veiths *v.* Hagge, 8 Iowa, 163; Burrows *v.* Lehndorff, Ibid. 96; Dent *v.* Smith, 53 Ibid. 262; Boatwright *v.* Stewart, 37 Arkansas, 614.

[6] Sackett *v.* McCord, 23 Alabama, 851.

[7] Raver *v.* Webster, 3 Iowa, 502.

terminated in favor of the defendant; but it is deemed quite as certain, that, in an action in the former class of cases, where malice is not involved, and only the wrong of the attachment is to be established, *if the suit was terminated by a finding in favor of the defendant, on an issue as to the truth of the facts alleged as the ground for the attachment*, then the judgment would conclusively establish that the attachment was wrongfully obtained.[1] So, if there was, when the attachment was obtained, no debt due from the defendant to the plaintiff.[2] On the other hand, if there was a verdict for the plaintiff on the trial of the truth of the facts so alleged, it is a determination that the attachment was rightfully sued out.[3]

But so far as the amount of the claim of the attachment plaintiff is involved in the question of the defendant's recourse upon the bond, the judgment in the attachment suit is conclusive; and if that be for a less sum than the law allows an attachment to issue for, it is complete evidence that the attachment was wrongfully obtained, though it does not settle the question of *wilful* wrong on the part of the attachment plaintiff.[4]

§ 173 *a*. In an action on the bond, the officer's return is conclusive as to the property returned as levied on, but it does not preclude proof that he seized more than he specified in his return.[5] Nor, in such case, is it any defence that the return does not show a levy made according to the statute, if a levy *de facto* was made. Nor is it a justification or mitigation of damages, that the claim sued on was a just one, where the statutory ground for suing out the attachment did not exist; for the claim may be just, and yet the attachment wrongful, and even wilfully wrong.[6] And where, to obtain an attachment of certain property, the attaching creditor averred it to be the defendant's, he cannot, when sued on the bond, set up as a defence that it was not.[7]

§ 173 *b*. If there be no levy of the attachment, there could, of course, be no recourse on the attachment bond in respect of damages on account of detention of property. But in Alabama

[1] Mitchell *v.* Mattingly, 1 Metcalfe (Ky.), 237; Boatwright *v.* Stewart, 37 Arkansas, 614.

[2] Lockhart *v.* Woods, 38 Alabama, 631; Tucker *v.* Adams, 52 Ibid. 254; Damron *v.* Sweetser, 16 Bradwell, 339.

[3] Calhoun *v.* Hannan, 37 Alabama, 277.

[4] *Post*, § 744; Gaddis *v.* Lord, 10 Iowa, 141.

[5] Hensley *v.* Rose, 76 Alabama, 373; Jefferson Co. Sav. Bank *v.* Evorn, 84 Ala. 529.

[6] Drummond *v.* Stewart, 8 Iowa, 341.

[7] Brandon *v.* Allen, 28 Louisiana Annual, 60.

it is held, that in such case special damage, such as injury to the defendant's credit, resulting from the mere issue of the writ, may be recovered; and that garnishment under the writ is, in effect, a levy, though the garnishee be not indebted to the defendant, and be discharged on his answer.[1]

§ 174. In an action on the bond, the attachment plaintiff cannot excuse himself, because, in obtaining the attachment, he acted in good faith;[2] nor will he be permitted to show that his debtor was insolvent;[3] nor can he — as he could if sued for a malicious attachment[4] — urge as a defence that other grounds of attachment than those specified in his affidavit, existed;[5] nor is the matter of probable cause involved, except in relation to the question of damages; and where the affidavit avers the existence of the ground for attachment, and not the plaintiff's belief of its existence, no belief of the attachment plaintiff, however firm and sincere, that he had good ground for obtaining the attachment, can affect the defendant's right to recover against him the *actual damage* he has sustained.[6] And in order to such recovery, it is not necessary for the defendant to show that he has paid the actual damages he has sustained.[7] And in Missouri it was held, that evidence of special damages, such as expenses of travel and attorney's fees, paid out in defence of the attachment suit, cannot be given under a general averment of damages, but must be specially averred. Said the court: "Damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law. But when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential that the resulting damage should be shown with particularity in order to prevent surprise to the defendant, which might otherwise ensue on the trial."[8] Afterwards the same court held special damages recoverable under an allegation that the attachment defendant "was compelled to and did lay out and expend large sums of money, and was put to

[1] Flournoy *v.* Lyon, 70 Alabama, 308.
[2] Churchill *v.* Abraham, 22 Illinois, 455.
[3] Kaufman *v.* Armstrong, 74 Texas, 65.
[4] *Post*, § 743.
[5] Blum *v.* Strong, 71 Texas, 321.
[6] Alexander *v.* Hutchison, 9 Alabama, 825; Donnell *v.* Jones, 13 Ibid. 490; Metcalf *v.* Young, 43 Ibid. 643; Durr *v.* Jackson, 59 Ibid. 203; Pollock *v.* Gantt, 69 Ibid. 373; Pettit *v.* Mercer, 8 B. Monroe, 51; Bear *v.* Marx, 63 Texas, 298; Woods *v.* Huffman, 64 Ibid. 98; Kennedy *v.* Meacham, 18 Federal Reporter, 312.
[7] Metcalf *v.* Young, 43 Alabama, 643.
[8] State *v.* Blackman, 51 Missouri, 319.

great expense and trouble in and about defending said action of attachment." [1]

§ 175. What is this *actual* damage? On general principles it must be the natural, proximate, legal result or consequence of the wrongful act. Remote or speculative damages, resulting from injuries to credit, business, character, or feelings, cannot be recovered.[2] In Mississippi, under a statute which authorized "loss of trade and special injury to business" to be considered, it was held, that contingent and uncertain profits, and losses of profits in speculative trade, could not be allowed.[3] In Ohio, where a stock of goods kept for sale by retail was seized, and the defendant's business consequently suspended, it was held, that the jury might allow for natural and necessary loss of business during the time the same was suspended; but not for injury to the reputation of the goods, supposed to affect their marketable value.[4] Actual damage may be properly comprehended under two heads: 1. Expense and losses incurred by the party in making his defence to the attachment proceedings; and 2. The loss occasioned by his being deprived of the use of his property during the pendency of the attachment, or by an illegal sale of it, or by injury thereto, or loss or destruction thereof.[5] For losses and trouble of these descriptions, the attachment defendant should be liberally remunerated.[6] But if the property attached was not the defendant's, he can recover no damages,[7] nor can he recover for expenses which he was not legally liable to pay.[8]

Where property is not levied on, but a garnishee is summoned,

[1] Kelly *v.* Beauchamp, 59 Missouri, 178.

[2] Reidhar *v.* Berger, 8 B. Monroe, 160; State *v.* Thomas, 19 Missouri, 613; Donnell *v.* Jones, 13 Alabama, 490; Floyd *v.* Hamilton, 33 Ibid. 235; Higgins *v.* Mansfield, 62 Ibid. 267; Pollock *v.* Gantt, 69 Ibid. 373; Kaufman *v.* Armstrong, 74 Ibid. 65; Jackson *v.* Smith, 75 Ibid. 97; Lee *v.* Wilkins, 1 Texas Unreported Cases, 287; Holliday *v.* Cohen, 34 Arkansas, 707; Oberne *v.* Gaylord, 13 Bradwell, 30; Campbell *v.* Chamberlain, 10 Iowa, 337.

[3] Myers *v.* Farrell, 47 Mississippi, 281. See Lowenstein *v.* Monroe, 55 Iowa, 82.

[4] Alexander *v.* Jacoby, 23 Ohio State, 358. See Holliday *v.* Cohen, 34 Arkansas, 707; Oberne *v.* Gaylord, 13 Bradwell, 30.

[5] Cox *v.* Robinson, 2 Robinson (La.), 313; Horn *v.* Bayard, 11 Ibid. 259; Pettit *v.* Mercer, 8 B. Monroe, 51; Reidhar *v.* Berger, Ibid. 160; McReady *v.* Rogers, 1 Nebraska, 124; Holliday *v.* Cohen, 34 Arkansas, 707; Boatwright *v.* Stewart, 37 Ibid. 614; Sanford *v.* Willetts, 29 Kansas, 647; Marqueze *v.* Southeimer, 59 Mississippi, 430; Knapp *v.* Barnard, 78 Iowa, 347.

[6] Offutt *v.* Edwards, 9 Robinson (La.), 90; Campbell *v.* Chamberlain, 10 Iowa, 337; Lawrence *v.* Hagerman, 56 Illinois, 68.

[7] Pinson *v.* Kirsh, 46 Texas, 26.

[8] State *v.* Kevill, 17 Missouri Appeal, 144.

and the attachment fails, an element of damage recoverable is the defendant's loss of interest on the debt of the garnishee *pendente lite.*[1]

§ 176. Under the first head will be allowed costs and expenses incurred in procuring the discharge of the attachment, and the restoration of the attached property;[2] costs and expenses in obtaining testimony on a trial of the truth of the affidavit on which the attachment was issued;[3] costs of suit to which the defendant has been subjected,[4] as well in an appellate court as in that in which the suit was brought;[5] and fees paid to counsel for services in defending the attachment suit;[6] but not fees to counsel in defending the cause of action;[7] nor fees to counsel employed by the attachment defendant to defend the garnishee from liability;[8] nor fees to counsel for services in the action on the bond.[9] In Texas, the court refused to allow attorney's fees, because it regarded them in the nature of exemplary damages, and because the defendant must have incurred that expense in defending the action, whether an attachment had been sued out or not.[10] And in that State the court refused to allow for the

[1] State *v.* Beldsmeier, 56 Missouri, 226; Jacobus *v.* Monongahela Nat. B'k, 35 Federal Reporter, 395.

[2] Alexander *v.* Jacoby, 23 Ohio State, 358; State *v.* McHale, 16 Missouri Appeal, 478; State *v.* Larabie, 25 Ibid. 208.

[3] Hayden *v.* Sample, 10 Missouri, 215.

[4] Dunning *v.* Humphrey, 24 Wendell, 31; Winsor *v.* Orcutt, 11 Paige, 578; Trapnall *v.* McAfee, 3 Metcalfe (Ky.), 34; Greaves *v.* Newport, 41 Minnesota, 240.

[5] Bennett *v.* Brown, 31 Barbour, 158; 20 New York, 99.

[6] Offutt *v.* Edwards, 9 Robinson (La.), 90; Littlejohn *v.* Wilcox, 2 Louisiana Annual, 620; Phelps *v.* Coggeshall, 13 Ibid. 440; Accessory Transit Co. *v.* McCerren, Ibid. 214; Trapnall *v.* McAfee, 3 Metcalfe (Ky.), 34; Seay *v.* Greenwood, 21 Alabama, 491; Burton *v.* Smith, 49 Ibid. 293; Higgins *v.* Mansfield, 62 Ibid. 267; Dothard *v.* Sheid, 69 Ibid. 135; Swift *v.* Plessner, 39 Michigan, 178; Raymond *v.* Green, 12 Nebraska, 215; Northrup *v.* Garrett, 24 New York Supreme Ct. 497; Baere *v.* Armstrong, 33 Ibid. 19; Vorse *v.* Phillips, 37 Iowa, 428; Whitney *v.* Brownewell, 71 Ibid. 251; Morris *v.* Price, 2 Blackford, 457; Damron *v.* Sweetser, 16 Bramwell, 339; Tyler *v.* Safford, 31 Kansas, 608; Frost *v.* Jordan, 37 Minnesota, 544; State *v.* Thomas, 19 Missouri, 613; State *v.* Beldsmeier, 56 Ibid. 226; State *v.* McHale, 16 Missouri Appeal, 478; Territory *v.* Rindscoff, 4 New Mexico, 363. *Sed contra*, Heath *v.* Lent, 1 California, 410; Patton *v.* Garrett, 37 Arkansas, 605.

[7] Accessory T. Co. *v.* McCerren, 13 Louisiana Annual, 214; Trapnall *v.* McAfee, 3 Metcalfe (Ky.), 34; Alexander *v.* Jacoby, 23 Ohio State, 358; Damron *v.* Sweetser, 16 Bradwell, 339; Burgen *v.* Sharer, 14 B. Monroe, 497; Johnson *v.* Farmers' Bank, 4 Bush, 283; Frost *v.* Jordan, 37 Minnesota, 544; Northampton National Bank *v.* Wylie, 59 New York Supreme Ct. 146.

[8] Pounds *v.* Hamner, 57 Alabama, 342; Hays *v.* Anderson, Ibid. 374; Flournoy *v.* Lyon, 70 Ibid. 308.

[9] Offutt *v.* Edwards, 9 Robinson (La.), 90; Plumb *v.* Woodmansee, 34 Iowa, 116; Vorse *v.* Phillips, 37 Ibid. 428; Hays *v.* Anderson, 57 Alabama, 374; Copeland *v.* Cunningham, 63 Ibid. 394.

[10] Hughes *v.* Brooks, 36 Texas, 379. See Littleton *v.* Frank, 2 Lea, 300.

party's time spent and expenses incurred in attending court in defence of the suit.[1] In Illinois, however, it was ruled that travelling expenses and hotel bills paid by the defendant in attending the court for the trial of the cause, were proper to be considered in the assessment of damages.[2] And so in Missouri,[3] and Tennessee.[4] Where the attachment is not the original process, but ancillary to an action instituted by summons, no costs or expenses connected with the defence of the suit, in aid of which the attachment was obtained, can be recovered.[5] Where, however, the suit is instituted by attachment, if the action be sustained, but the attachment defeated, the rule in Indiana is, that the attorney's fees for defending against the attachment should be allowed, but not those for defending the action; but where both the action and the attachment are defeated *because there was no foundation for the former*, the attorney's fees for defending both the action and the attachment may be allowed.[6] When it is sought to recover for counsel fees in defending the attachment, it is held, in Kentucky, that no recovery can be had unless the fees were paid, or contracted to be paid, and are proved to be reasonable.[7] As to costs, the Court of Appeals of that State held, that if the whole costs turn upon the defence of the cause of action, they are not recoverable upon the attachment bond; if incurred in defending the cause of attachment alone, they are recoverable; if incurred partly in defending the cause of action, and partly in defending the cause of attachment, they are recoverable only so far as incurred in defence of the attachment.[8] And so, in effect, in Ohio.[9]

In Alabama, in regard to counsel fees paid by the attachment defendant in the defence of the attachment suit, it is held, that such fees in defending the case on appeal to the Supreme Court cannot be recovered as general damages, but must be claimed as *special* damages.[10]

§ 177. The rule of damages under the second head has been variously laid down. In New York, it was said by the Supreme

[1] Harris *v.* Finberg, 46 Texas, 79; Craddock *v.* Goodwin, 54 Ibid. 578. See Goodbar *v.* Lindsley, 51 Arkansas, 380.

[2] Damron *v.* Sweetser, 16 Bradwell, 339.

[3] State *v.* Shobe, 23 Missouri Appeal, 474.

[4] Kennedy *v.* Meacham, 18 Federal Reporter, 312.

[5] White *v.* Wyley, 17 Alabama, 167.

[6] Wilson *v.* Root, 43 Indiana, 486. See Behrens *v.* McKenzie, 23 Iowa, 333.

[7] Shultz *v.* Morrison, 3 Metcalfe (Ky.), 98.

[8] Johnson *v.* Farmers' Bank, 4 Bush, 283.

[9] Alexander *v.* Jacoby, 23 Ohio State, 358.

[10] Dothard *v.* Sheid, 69 Alabama, 135.

Court: "The plaintiff is entitled to such damages as a jury may think he has sustained by the wrongful seizing and detaining of his property. If it was taken out of his possession, he may be entitled to the value of it; if seized and left in his possession, to such damages as may be awarded for the unlawful intermeddling with his property." [1] But the same court afterwards held, that no more than nominal damages can be recovered, where the defendant is not dispossessed.[2] In Iowa it was held, that where a stock of goods was attached, under a writ wrongfully sued out, the measure of damages therefor is the cost of replacing them at the place where they were levied on.[3] In Texas, in such case, the rule of damages is the market value of the goods at the place and on the day of their seizure, with interest.[4]

§ 178. In Kentucky, the plaintiff can only recover damages for the injury he has sustained by being deprived of the use of his property, or its loss, destruction, or deterioration.[5] Subsequently, the court stated the rule on some points more specifically, and said: "The inquiry in regard to the injury which the party may sustain by the deprivation of the use of his property, should be limited to the actual value of the use; as, for example, the rent of real estate, the hire of services of slaves, or the value of the use of any other species of property in itself productive. The property in this case was not of that character, and the injury from being deprived of its use should be restricted to the interest on the value thereof. For any injury beyond that, the damages would be conjectural, indefinite, and uncertain, and the plaintiff cannot recover in this action. If, however, the property is damaged, or if when returned it should be of less value than when seized, in consequence of the depreciation in price, or from any other cause, for such difference the plaintiff would be entitled to recover. But this rule, so far as it relates to the fall or depreciation of the price, would not be applicable to every species of property. It would, however, clearly apply in this case, as it was the trade and business of the party to vend the goods attached, and not to keep them for mere use." [6] In Mississippi, it was decided that where, between the levy and

[1] Dunning *v.* Humphrey, 24 Wendell, 31.

[2] Groat *v.* Gillespie, 25 Wendell, 383.

[3] Selz *v.* Belden, 48 Iowa, 451.

[4] Wallace *v.* Finberg, 46 Texas, 35; Blum *v.* Merchant, 58 Ibid. 400; Tucker *v.* Hamlin, 60 Ibid. 171, Willis *v.* Lowry, 66 Ibid. 540; Mayer *v.* Duke, 72 Ibid. 445.

[5] Pettit *v.* Mercer, 8 B. Monroe, 51. See Wallace *v.* Finberg, 46 Texas, 35.

[6] Reidhar *v.* Berger, 8 B. Monroe, 160; Carpenter *v.* Stevenson, 6 Bush, 259. See Holliday *v.* Cohen, 34 Arkansas, 707.

the dissolution of the attachment, the goods levied on had depreciated in market value, the defendant was entitled to recover the amount of the depreciation.[1] And so in California,[2] and Iowa.[3] But such depreciation should be specially pleaded.[4] In Wisconsin, the Supreme Court stated that the only damages which the defendant is entitled to recover are costs and expenses incurred by him in setting aside the attachment, interest on the value of the property attached from the time it was attached until released from the attachment, depreciation in the value of the property, if any, during that time, and the value of the defendant's time actually spent in procuring the setting aside of the attachment.[5]

In Kansas, where a herd of cattle were attached, and removed from the range where they had been kept, and placed in charge of a herder on a new range, where both grass and water were limited and poor, and consequently they failed to make the growth in weight which, kept as they had been, they would ordinarily, during the time of such detention, make, if left upon the range from which they were taken; it was held, that, though they did not lose in weight, yet the failure to make the ordinary and expected increase in weight was a gain prevented, for which the owner was entitled to compensation, if the attachment was wrongfully obtained.[6]

§ 179. The court properly intimated, in the language just quoted, that the allowance for depreciation in the value of the property while under attachment would not be applicable to every species of property. For instance, if real estate be attached, without interfering with the defendant's possession, nothing can be recovered in an action on the bond, on account of depreciation in its value during the pendency of the attachment.[7]

§ 179 *a*. When through a wrongful attachment the defendant's property is wholly lost to him, he is entitled to recover on the attachment bond the value of it when attached, with interest; but if the property was sold by order of the court, and the proceeds applied upon the judgment obtained in the attachment suit

[1] Fleming *v.* Bailey, 44 Mississippi, 132.
[2] Frankel *v.* Stern, 44 California, 168.
[3] Lowenstein *v.* Monroe, 55 Iowa, 82.
[4] Wallace *v.* Finberg, 46 Texas, 85.
[5] Braunsdorf *v.* Fellner, 76 Wisconsin, 1.
[6] Hoge *v.* Norton, 22 Kansas, 374.
[7] Heath *v.* Lent, 1 California, 410.

against the defendant, the amount of the proceeds must be deducted from the value found.[1]

§ 179 *b*. In California, where the attachment defendant was engaged in the dairy and farming business, and his wagons, horses, cows, and other personal property, were seized under an attachment, and were detained more than two months, when they were released by a judgment in favor of the defendant; who thereupon sued on the plaintiff's undertaking to "pay all damages which the defendant may sustain by reason of the attachment;" it was held erroneous to charge the jury that the measure of damages was what the use of the property was worth to the attachment defendant during the time he was deprived of it; and that in ascertaining the value the jury should consider how *he could and would* have used the property had it not been taken from him. "This was," said the court, "substituting a speculative and peculiar measure of damages for the true rule, which, as applied to the case, was what the use of such property could have been procured for, — in other words, the market value."[2]

§ 179 *c*. In Missouri, an attachment was levied on teams of horses and mules, and wagons of a defendant, who was engaged with his teams in the performance of certain contracts for the building of levees, and was obliged, in order to perform his contracts, to hire other teams to take the place of those seized by the sheriff. The attachment was defeated; and the defendant therein sued on the plaintiff's bond; which was conditioned to "pay all damages and costs that might accrue to the defendant by reason of the attachment, or any process or proceeding in the suit." At the trial the question was raised whether the expenses to which the defendant in the attachment suit had been put by reason of having to hire other animals to replace those which were seized, was to be regarded as natural and proximate damages resulting from the suing out of the attachment; and it was held to be recoverable as such.[3]

§ 180. In Louisiana, parties took out an attachment in February, 1842, against the Girard Bank, and seized certain *choses in action*, which, at the time, and for some months after, were worth in New Orleans $18,500. In August, 1842, the attach-

[1] Boatwright *v.* Stewart, 37 Arkansas, 614.

[2] Hurd *v.* Barnhart, 53 California, 97.

[3] State *v.* McKeon, 25 Missouri Appeal, 667.

ment plaintiffs, having obtained judgment, caused the *choses in action* to be sold by the sheriff, at a great sacrifice, for the sum of $9,140. Afterwards, the judgment was reversed, and the assignees of the bank sued the attachment plaintiffs for the difference between these sums, and recovered judgment for $5,145 damages. Whether the suit was on the attachment bond does not appear in the report of the case. The Supreme Court affirmed the judgment, holding the plaintiffs entitled to recover the actual damage sustained.[1]

§ 181. In New York, an action was brought on an attachment bond, where it appeared that the plaintiff in the attachment was nonsuited; but immediately after sued out another attachment, and seized the same property that was attached in the first suit; and afterwards, on obtaining judgment, caused the property to be sold under his execution. It was held, that the application of the defendant's property to the satisfaction of the judgment in the second suit, was properly admissible in evidence, to reduce the amount of damages sought to be recovered.[2]

§ 181 *a*. A frequent result of the issue of one attachment against a debtor is for several others, in favor of different creditors, to be obtained. If the defendant succeeds in defeating the first, he may seek to make that creditor responsible for all the damages resulting from all the attachments, because he made the first attack. The Supreme Court of Mississippi met such an attempt with the following remarks: "As a rule, every one is liable for his own wrong, and not for that of another. A wrong-doer is responsible for the consequences produced by his own act, but not for what others, acting independently of him and for themselves, may do, even though his act may be the occasion of their doing what they do. That another independent agent, acting on his own responsibility, does something, because one has done a particular thing, does not make such one responsible for the act of the other. They are independent actors, and each is answerable for his own acts, because of the want of causal connection between the acts. Consecutive wrongs done by independent agents cannot be conjoined to increase or enlarge the responsibility of one of them. If others attach, after another, and because he has attached, they are responsible severally for what they do, and the first attaching creditor is not responsible for any injury occasioned

[1] Horn *v.* Bayard, 11 Robinson (La.), 259.

[2] Earl *v.* Spooner, 3 Denio, 246.

by the acts of the others, although they merely followed his example."[1]

§ 182. The liability of an attachment plaintiff for actual damage exists as well where the attachment is sued out by his attorney as where he obtains it himself; but no malice exhibited by the attorney in his proceedings can be given in evidence against his client, so as to make him liable for exemplary damages.[2] And where the attachment was taken out by an agent, who also executed the bond, the declaration on the bond was held to be insufficient, which charged that the attachment was wrongfully and vexatiously sued out by the obligors in the bond; it should have averred that it was so sued out by the plaintiff.[3]

§ 183. An administrator who sues out an attachment and executes the bond, describing himself therein as administrator, cannot be sued on the bond in his representative character, nor can he subject the estate to an action for damages by his tortious conduct. He is liable to respond personally for the injury, and is properly sued in his individual character.[4]

§ 183 *a*. If a defendant in an attachment suit sue the plaintiff for maliciously suing out the attachment, and recover damages in general therefor, he cannot afterwards maintain an action on the attachment bond to recover special damages for expenses, loss of time, attorney's fees, and loss of and injury to the attached property; for the former action comprehended all that, and in it he had the right to recover the entire damage he may have sustained.[5]

[1] Marqueze *v.* Sontheimer, 59 Mississippi, 430.

[2] Kirksey *v.* Jones, 7 Alabama, 622; McCullough *v.* Walton, 11 Ibid. 492.

[3] McCullough *v.* Walton, 11 Alabama, 492; Wallace *v.* Finberg, 46 Texas, 35.

[4] Gilmer *v.* Wier, 8 Alabama, 72.

[5] Hall *v.* Forman, 82 Kentucky, 505.

CHAPTER VII.

EXECUTION AND RETURN OF AN ATTACHMENT.

§ 183 *b*. THE power and duty of an officer to make an attachment depend upon his possession of process authorizing it. The duty may be qualified, or he may be relieved of it altogether, by instructions; but it exists only while the power exists, and both come into existence when the process is placed in his hands. Until then he has no authority to act, and cannot be justified in interfering with the property of others, though he have information that the process has been issued. Thus, in Connecticut an officer lodged with the town clerk a certificate that he had attached certain real estate of a defendant in an attachment suit; which, if the writ had been in his possession, would, under the law of that State, have constituted a valid attachment; but it appeared that, when he so lodged the certificate, he had no writ in his hands, and did not receive any till the day after that on which the lodgment of the certificate was made, but acted upon information that a writ had been issued; and it was held that there was no valid attachment.[1] But if the officer have received the writ and it be in his custody and control, it is not necessary, when he makes a levy under it, that he should have the writ on his person.[2]

§ 183 *c*. A writ of attachment made returnable to a day and a term of court past at the time of its issue, is void on its face, and all proceedings thereunder are void.[3]

§ 183 *d*. If a writ of attachment be delivered, for service, to an officer not legally authorized to serve it, and under it he levy on property, the levy is a naked trespass on his part, and on the

[1] Wales *v.* Clark, 43 Conn. 183. See Carroll County B'k *v.* Goodall, 41 New Hamp. 81.

[2] Barney *v.* Rockwell, 60 Vermont, 444.

[3] Holzman *v.* Martinez, 2 New Mexico, 271.

part of all persons directing or participating in such unlawful action, and, of course, is utterly devoid of legal efficacy. And the defect is not cured by the defendant's giving a bond to the officer whose legal right it was to serve the writ, to procure the release of the property.[1]

§ 184. When a writ of attachment is placed in the hands of an officer to be executed, his first duty — which he cannot ever safely overlook — is, to ascertain that it was issued by an officer having legal power to issue it; for if issued by one having no such power, it is absolutely void, and will afford no protection whatever to him who acts under it. Nor can the court out of which it purported to have issued acquire through it, or through the judgment in the case, any right to control the disposition of the money accruing from a sale of attached property. Thus, where an attachment was issued by the clerk of a court, who had no lawful authority to issue it, and under it property was seized and sold, and the proceeds thereof were placed in the hands of the clerk as an officer of the court; and the court ordered a part of the money to be paid to the landlord of the building in which the attached goods were found, as rent due him therefor from the attachment defendant; it was held, that the money was in the hands of the clerk as an individual bailee, and was not subject to the order of the court, and that the order, not being within the jurisdiction of the court, was void.[2]

§ 184 *a*. If an attachment be issued by a person who has been appointed to, and is *de facto* exercising, the functions of an officer entitled to issue such a writ, it is no ground for a plea in abatement to the writ, that he had not taken the oath of office required by law. In such case the law knows no distinction, so far as the public and third persons are concerned, between the official acts of an officer *de jure*, and those of an officer *de facto*.[3]

§ 184 *b*. If the writ be so defective that it is void, a levy under it cannot be cured by amendment, so as to cut off the rights of third parties in the attached property, acquired after the levy.

[1] Weingardt *v.* Billings, 51 New Jersey Law, 354. See Carroll County B'k *v.* Goodall, 41 New Hamp. 81.

[2] Goldsmith *v.* Stetson, 39 Alabama, 183. See Vann *v.* Adams, 71 Ibid. 475; Jackson *v.* Bain, 74 Ibid. 328. Nor can the money, in such case, be reached by creditors of the attachment defendant by garnishment of the clerk. See *post*, § 545.

[3] Joseph *v.* Cawthorn, 74 Alabama, 411.

Thus, where an attacher made a mistake in the name of a garnishee upon whom the writ was served, and before he discovered his mistake other attachers summoned the same garnishee under process containing the right name; after which he amended his writ, and served it on the garnishee again; it was held, that the last service could not give him priority over the second attachers.[1] In Maine there is a statute providing that no attachment "shall be valid, unless the plaintiff's demand on which he founds his action, and the nature and amount thereof, are substantially set forth in proper counts, or a specification of such claim shall be annexed to such writ." The Supreme Court of that State held, that a writ based on a money count containing no specification of the nature and amount of the plaintiff's demand, is void;[2] and that an amendment of the writ before judgment will not make it so far valid as that the title acquired under it will prevail against a mortgage executed between the service of the writ and the judgment.[3]

§ 185. If the writ be in legal form, and issued out of a court having competent jurisdiction, it will be a complete justification to the officer in attaching the defendant's property, and in using, to effect the attachment, all necessary force; and there can, therefore, be no obligation on him to investigate whether the preliminary steps required for obtaining it have been pursued.[4] And though the process may be erroneous and voidable, that fact will neither prevent him from protecting himself by it, nor justify him in omitting to do his duty in its execution.[5] Nor has he anything to do with the question whether the debt is actually due. It may be that no cause of action exists; but with that he has no concern; for it is not his province to decide the question of liability between the parties.[6] In Michigan, it was held

[1] Kittredge *v.* Gifford, 62 New Hamp. 134.

[2] Saco *v.* Hopkinton, 29 Maine, 268. Osgood *v.* Holyoke, 48 Ibid. 410; Neally *v.* Judkins, Ibid. 566; Hanson *v* Dow, 51 Ibid. 165.

[3] Drew *v.* Alfred Bank, 55 Maine, 450.

[4] Fulton *v.* Heaton, 1 Barbour, 552; Kirksey *v.* Dubose, 19 Alabama, 43; Banta *v.* Reynolds, 3 B. Monroe, 80; Garnet *v.* Wimp, Ibid. 360; Ela *v.* Shepard, 32 New Hamp. 277; Owens *v.* Starr, 2 Littell, 230; Lovier *v.* Gilpin, 6 Dana, 321; Walker *v.* Woods, 15 California, 66; Booth *v.* Rees, 26 Illinois, 45; State *v.* Foster, 10 Iowa, 435; Lashus *v.* Matthews, 75 Maine, 446; Mayer *v.* Duke, 72 Texas, 445.

[5] Stevenson *v.* McLean, 5 Humphreys, 332; Reams *v.* NcNail, 9 Ibid. 542; Shaw *v.* Holmes, 4 Heiskell, 692; Bogert *v.* Phelps, 14 Wisconsin, 88; Cross *v.* Phelps, 16 Barbour, 502: Babe *v.* Coyne, 53 California, 261; Roth *v.* Dewall, 1 Idaho, 149; Mathews *v.* Densmore, 109 U. S. 216.

[6] Livingston *v.* Smith, 5 Peters, 90; Walker *v.* Woods, 15 California, 66; Mamlock *v.* White, 20 Ibid. 598; Rice *v.* Miller, 70 Texas, 613.

that a U. S. marshal, levying an attachment which had been issued on a defective affidavit, could not justify under that writ;[1] but the Supreme Court of the United States reversed that decision, holding that the writ was not absolutely void, but only voidable;[2] and the U. S. Circuit Court in Michigan decided that where right and justice require it, the plaintiff should be allowed to amend the affidavit, although under the statutes of the State a court of the State would have no power to allow such an amendment.[3]

§ 185 *a*. When the officer attaches property found in the possession of the defendant, he can always justify the levy by the production of the attachment writ, if the same was issued by a court or officer having lawful authority to issue it, and be in legal form. But when the property is found in the possession of a stranger claiming title, the mere production of the writ will not justify its seizure thereunder; the officer must go further, and prove not only that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued.[4] If, in the attachment suit, judgment was rendered for the plaintiff, that will establish the indebtedness; if not, the officer must prove it otherwise, in order to justify his proceeding.[5] Of course, the party whose property has been wrongfully taken may prove that there was no indebtedness.[6]

§ 185 *b*. Though a writ issued by competent authority, and regular on its face, will afford protection to an officer acting under it, it does not, if issued irregularly, afford the same protection to the party who caused its issue. The responsibility rests upon him, not only to see that it is right in those particulars, but that it was regularly issued; for if it be set aside for irregularity, that makes the party a trespasser *ab initio*, and

[1] Mathews *v.* Densmore, 43 Michigan, 461.

[2] Mathews *v.* Densmore, 109 U. S. 216.

[3] Erstein *v.* Rothschild, 22 Federal Reporter, 61.

[4] Thornburgh *v* Hand, 7 California, 554; Noble *v.* Holmes, 5 Hill (N. Y.), 194; Van Etten *v.* Hurst, 6 Ibid. 311; Mathews *v* Densmore, 43 Michigan, 461; Oberfelder *v* Kavanaugh, 21 Nebraska, 483; Williams *v.* Eikenberry, 25 Ibid. 731.

[5] Damon *v.* Bryant, 2 Pick. 411; Rinchey *v.* Stryker, 28 New York, 45; Sexey *v.* Adkinson, 34 California, 346; Brichman *v.* Ross, 67 Ibid. 601; Miller *v.* Bannister, 109 Mass. 289; Braley *v.* Byrnes, 20 Minnesota, 435; Hines *v.* Chambers, 29 Ibid. 7; Howard *v.* Manderfield, 31 Ibid. 337; Maley *v.* Barrett, 2 Sneed, 501; Cross *v.* Phelps, 16 Barbour, 502; Jones *v.* Lake, 2 Wisconsin, 210; Norton *v* Kearney, 10 Ibid. 443; Bogert *v.* Phelps, 14 Ibid. 88

[6] Cook *v.* Hopper, 23 Michigan, 511.

affords him no protection as to what has been done under it: as to him, it is then as though no process had ever been issued, and the property attached had been taken and detained by his order without any process.[1]

§ 185 *c*. When an attachment fails because the writ was issued without jurisdiction, or irregularly, and the attaching plaintiff is sued in trespass for seizing property thereunder, he cannot set up as a defence that he returned the property to the defendant, unless the latter accepted it.[2] But he can show, in mitigation of damages, that afterwards the property was sold under a valid execution against the attachment defendant, and the proceeds were applied to the payment of his debt. It has been held in New York, that this would not avail if the sale were under an execution in favor of the party under whose void attachment the property was seized;[3] but would if made under an execution in favor of another creditor without any connivance with the defeated plaintiff.[4] But the New York doctrine does not seem to be elsewhere accepted. The question received careful consideration and exhaustive treatment in New Jersey, where the Supreme Court said: "So far as the question of compensation to the plaintiff is concerned, it is obviously immaterial whether the goods are taken from the wrong-doer by process sued out by the wrong-doer himself or by a third party. In either event they are applied to the plaintiff's use, and his loss, by reason of the trespass, is diminished as much in the one case as in the other. . . . Where the goods are seized in the hands of the trespasser by legal process, and applied to the payment of the debts of the owner, they are not so applied *by the act of the tort-feasor*, but by act and operation of law. And, upon principle, it is perfectly immaterial whether the machinery of law be set in operation by a third party or by the tort-feasor himself. In either event the property of the plaintiff, unlawfully taken from his possession, is by sanction of law taken from the trespasser, and applied to the use of the owner. As a matter of right and

[1] Kerr *v.* Mount, 28 New York, 659; Wehle *v.* Butler, 61 Ibid. 245; Hall *v.* Waterbury, 5 Abbott's New Cases, 374; Connelly *v.* Woods, 31 Kansas, 359; McFadden *v.* Whitney, 51 New Jersey Law, 391.

[2] Hanmer *v.* Wilsey, 17 Wendell, 91; Otis *v.* Jones, 21 Ibid. 394; Higgins *v.* Whitney, 24 Ibid. 379; Ball *v.* Liney, 48 New York, 6; Tiffany *v.* Lord, 65 Ibid. 310.

[3] Higgins *v.* Whitney, 24 Wendell, 379; Lyon *v.* Yates, 52 Barbour, 237; Wehle *v.* Butler, 35 New York Superior Ct. 1; 48 Howard Pract. 5; 12 Abbott Pract. 139; 61 New York, 245.

[4] Sherry *v.* Schuyler, 2 Hill (N. Y.), 204; Wehle *v.* Butler, 61 New York, 245.

justice, therefore, he is entitled to so much less damages as a compensation for his injury."[1]

§ 185 *d*. An officer cannot execute a writ of attachment in a suit in which he is interested, nor can it be executed by his deputy where either the officer or the deputy is interested.[2] Nor can the officer specially deputize one of the attachment plaintiffs, or other party interested in the case, to serve the writ.[3]

§ 186. If a writ of attachment be placed in the hands of a person specially deputed to serve it, he has all the powers which may be exercised by a sheriff in the premises, but he is not entitled of right to be recognized or obeyed as a sheriff, or known officer, but must show his authority, and make known his business, if required by the party who is to obey that authority. In this particular he represents a special bailiff, rather than a known officer. One so deputed may, equally with a sheriff, break into a warehouse to get access to goods, where admittance is refused him.[4]

§ 187. An attachment comes within the terms of a statute forbidding the service on Sunday of any "writ, process, order, warrant, judgment, or decree;" and a service of it on that day will be set aside on motion; but cannot be reached by a plea in abatement.[5] But where there is no prohibitory statute, it may be executed on that day.[6] If the statute authorizes the issue and service of the writ on Sunday, under special circumstances defined in the statute, the affidavit must show the existence of those circumstances, in order to authorize the issue of the writ on that day.[7] If a writ be delivered to an officer on Sunday, he is not to be regarded as having officially received it, nor can he be held responsible for not executing it on that day. He may, if he choose, recognize the receipt of it, but that will impose on

[1] Hopple *v.* Higbee, 3 Zabriskie, 342; McFadden *v.* Whitney, 51 New Jersey Law, 391. See Curtis *v.* Ward, 20 Conn. 204; Pierce *v.* Benjamin, 14 Pick. 356; Doolittle *v.* McCullough, 7 Ohio State, 299; Morrison *v.* Crawford, 7 Oregon, 472; Wieland *v.* Oberne, 20 Illinois Appellate, 118; Howard *v.* Manderfield, 31 Minnesota, 337.

[2] Evarts *v.* Georgia, 18 Vermont, 15; Lyman *v.* Burlington, 22 Ibid. 131; McLeod *v.* Harper, 43 Mississippi, 42.

[3] Boykin *v.* Edwards, 21 Alabama, 261; Dyson *v.* Baker, 54 Mississippi, 24.

[4] Burton *v.* Wilkinson, 18 Vermont, 186.

[5] Cotton *v.* Huey, 4 Alabama, 56.

[6] Matthews *v.* Ansley, 31 Alabama, 20. In Kansas, it was held, on common-law grounds, that a service of a writ of attachment on Sunday was void. Morris *v.* Shew, 29 Kansas, 661.

[7] Updyke *v.* Wheeler, 37 Missouri Appeal, 680.

him no higher or other duties than if he had received it on the next day.[1] In England, it is said that Christmas is considered a *dies non juridicus;* but it was held not so in this country.[2]

§ 187 *a.* The authority of an officer to levy an attachment continues until the return day of the writ, or until he has actually returned it, if he do so before that day. The fact that before the return day he indorsed on the writ a return of "no property found," but kept the writ in his hands, will not prevent his subsequently levying it, and making return of the levy, at any time before the return day.[3]

§ 187 *b.* No levy made after the return day of the writ will be of any force, at least as against a third party claiming the property. Thus, where an attachment was made on the 28th of December, 1822, under a writ dated February 28, 1822, and returnable to the next May Term of the court after its date; and trover was brought against the officer for the property; it was held, that the officer should not be permitted to prove that the writ was in fact sued out on the first-named date, and was intended to be made returnable to May Term, 1823, but the word "February" had been inserted by mistake; and that, as the writ was made returnable at May Term, 1822, nothing could be done under it in the following December.[4] So, where the writ was issued on the 21st of May, and made returnable to the next June Term of the court, but was indorsed "November Term, 1866;" and on the 10th of August after its issue was levied on real estate; the levy was held of no force as against a subsequent mortgage of the land.[5]

In determining the return day of the writ, where the day of the month on which it is returnable is specified, but without mention of the year, or other designation of the time, it will be considered that the next month of that name after the date of the writ was intended.[6]

§ 188. It is the duty of an officer, on receiving a writ of attachment, to levy it on any property of the defendant he can find, of the description recited in the writ. It is never discretionary

[1] Whitney *v.* Butterfield, 13 California, 335.
[2] Starke *v.* Marshall, 3 Alabama, 44.
[3] Courtney *v.* Carr, 6 Iowa, 238.
[4] Dame *v.* Fales, 3 New Hamp. 70.
[5] Peters *v.* Conway, 4 Bush, 566.
[6] Kelly *v.* Gilman, 29 New Hamp. 385; Nash *v.* Mallory, 17 Michigan, 232; Vinton *v.* Mead, Ibid. 388.

with him, if he finds such property, whether to execute the writ or not; nor is he allowed to provide for the plaintiff another remedy than that afforded by the writ, for the collection of his debt. He must take the property into the custody of the law. Any agreement to induce him to omit the performance of his duty is void, upon considerations of public policy. Thus, where an officer having a writ of attachment in his hands, was induced to forbear levying it, by the defendant's executing a bond in favor of the plaintiff, with security, conditioned to save the officer harmless by reason of his not proceeding to attach property, and to pay whatever judgment might be rendered against the defendant; and the plaintiff afterwards recovered judgment in the attachment suit, and, failing to make the money therein, sued upon the bond; it was held, that no action could be maintained on it, and that it was not such a security as the plaintiff, by adopting, could render valid.[1]

§ 189. To ascertain who is the actual owner of personal property, notwithstanding the indication arising from acts of ownership, is often attended with difficulty; and an officer ought not to be holden to proceed to make an attachment, without an indemnity, where there is great danger of his committing a trespass in so doing; and where he has good reason to doubt whether goods are the property of the defendant, he may insist on the plaintiff's showing them to him, and also on being indemnified.[2]

But if he would avail himself of the right to require indemnity he must inform the party who placed the writ in his hands that he objects to proceeding without it. He cannot neglect to execute the writ, and then justify his neglect by the failure of the party to indemnify him, when he asked no indemnity.[3]

If property be attached without any controversy at the time as to the title, and it is afterwards claimed by a third person, it is held in New Hampshire, that the officer may demand indemnity before proceeding to sell the property under the attachment or under execution issued in the attachment suit.[4] This, however,

[1] Cole v. Parker, 7 Iowa, 167; Denson v. Sledge, 2 Devereux, 136.

[2] Bond v. Ward, 7 Mass. 123; Sibley v. Brown, 15 Maine, 185; Ranlett v. Blodgett, 17 New Hamp. 298; Perkins v. Pitman, 34 Ibid. 261; Smith v. Osgood, 46 Ibid. 178; Smith v. Cicotte, 11 Michigan, 383; Chamberlain v. Beller, 18 New York, 115 · Shriver v. Harbaugh, 37 Penn. State, 399. In Tennessee it is held, that there is no law authorizing an officer to require indemnity before levying an attachment on disputed property. Shaw v. Holmes, 4 Heiskell, 692.

[3] Perkins v. Pitman, 34 New Hamp. 261.

[4] Smith v. Osgood, 46 New Hamp. 178

would hardly be considered applicable to any system which allowed the third person to intervene in the attachment suit, and have his claim to the property adjudicated therein directly by the court.

If there are several attaching creditors of the same property, and some give indemnity and others refuse to do so, the latter will be precluded from claiming the avails of the attached property, even though their attachments under the original writ were prior to those of the parties who gave indemnity.[1]

When a plaintiff, at the request of the officer, and with knowledge that the goods to be attached are claimed by another than the defendant, gives a bond of indemnity to the officer against all suits, damages, and costs by reason of the attachment, he thereby assumes the responsibility of the officer's acts, and is liable to the owner for the subsequent conversion of the goods; and an unsatisfied judgment for the same cause against the officer is no bar to his recourse against the plaintiff.[2]

§ 189 *a*. When an officer takes a writ, with directions to serve it in a particular manner, without requiring of the plaintiff an indemnity, he is bound to serve it, if he can, according to the instructions; and it is not a sufficient excuse for him that he subsequently obtained information which led him to suppose that a service in the manner directed would be ineffectual for the interests of the plaintiff, and even expose himself to an action, if his supposition was erroneous, and a service in the manner directed would, in fact, have been legal and effectual. He is liable unless he can show that he could not lawfully have obeyed the directions.[3]

§ 190. The officer is bound to attach sufficient property, if it can be found, to secure the amount of the plaintiff's claim, as stated in the writ, and failing in this he will be liable for any deficiency.[4] Where, therefore, an officer levied three attach-

[1] Smith *v.* Osgood, 46 New Hamp. 178.

[2] Knight *v.* Nelson, 117 Mass. 458.

[3] Ranlett *v.* Blodgett, 17 New Hamp. 298.

[4] In Fitzgerald *v.* Blake, 42 Barbour, 513, the Supreme Court of New York used the following language: "It is the duty of the sheriff to attach so much of the property of the defendant as will be sufficient to satisfy the plaintiff's demand, with costs and expenses. In this case the sheriff has levied on so much as he considered sufficient. The extent of the seizure was within the exercise of a sound discretion by the sheriff. If his levy was excessive, the defendant might complain; and if insufficient, the plaintiff. He is responsible to both parties for the exercise of a sound and reasonable discretion in performing his duty. The plaintiff has no authority to dictate the extent of the levy, any more than the defendant has to limit it. The plaintiff can

ments successively on a defendant's personal property; and having received a fourth writ, levied it on his real estate, the proceeds of which were absorbed in satisfying that writ; and it was afterwards ascertained that the personalty, on which the preceding three writs were levied, was not sufficient to satisfy them; it was held that the officer was liable for the deficiency; that he might have levied all the writs on all the property; that he was bound at his peril, if he did not levy on all, to levy on enough to satisfy the demands; and that he was not excused by the fact that an appraisement of the personalty, made after the levy, indicated an amount sufficient for that purpose.[1] If in such case an officer represent to the plaintiff that he made an attachment, when in point of fact he did not, and thereby induced the plaintiff to rely upon it, and to forego making any further attachment, when he might have done so, the officer is bound by his representation, and when sued by the plaintiff for failing to attach sufficient property, is estopped from showing that in fact he made no legal attachment.[2] But, if, by a mistake of the plaintiff in making out the writ, the amount which the sheriff is required to secure is less than the debt sued on, and the sheriff receive from the defendant a sum of money equal to the amount named in the writ and costs, and release property attached by him, which was of sufficient value to have secured the whole debt; the sheriff will not be held responsible for the difference between the amount paid him and that of the judgment recovered by the attachment plaintiff; for he was misled by the mistake of the plaintiff himself.[3]

§ 191. It is the duty of the officer to execute the writ as soon as he reasonably can after it comes into his hands; for if by his unnecessary delay in seizing property or summoning garnishees the plaintiff loses his debt, the officer will be liable; and his liability will not be avoided by his showing that he was not specially required to serve the writ immediately, or that it was in fact served within the time authorized by its terms.[4] And after the attachment is begun, it should be continued with as little interruption as possible. Delay or interruption in the discharge of this duty may involve the officer in serious consequences.

point out property to the sheriff, and require a levy upon so much as will be sufficient, but the sheriff must decide for himself, upon the responsibility which attaches to his office, as to the extent and sufficiency of the seizure."

[1] Ransom v. Halcott, 18 Barbour, 56.
[2] Howes v. Spicer, 28 Vermont, 508.
[3] Page v. Belt, 17 Missouri, 263.
[4] Kennedy v. Brent, 6 Cranch, 187.

No general rule governing such cases can well be laid down; but each case must depend very much on its particular circumstances. As a proposition generally applicable, however, it may be said that the officer should take care that his levy be a continuous and single act, as contradistinguished from a number of distinct acts, performed at different times, and not in reasonable and necessary connection.

§ 191 *a*. While the law holds an officer to a strict performance of his duty in the execution of process placed in his hands, and tolerates no wanton disregard of that duty, nor sanctions any negligence, yet it requires no impossibilities, nor does it impose unconscionable exactions. When an attachment comes to his hands, he must execute it with all reasonable celerity; but he is not held to the duty of starting, on the instant after receiving it, to execute it, without regard to other business demanding his attention, unless some special reasons for urgency exist, and are made known to him. Reasonable diligence is all that is required of him in such a case; and what is reasonable diligence depends upon the particular facts of the case. If, for example, an officer receives no special instruction to execute a writ at once, and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligation to execute it instantaneously as if he were so instructed, or there were apparent circumstances of urgency. But in the case of an attachment sued out on the ground of the defendant's fraud, or his being in the act of leaving the State, or removing his property, the very fact of the issue of the writ on such ground would seem to indicate to the officer the necessity for immediate action. These views were applied, in California, to a case where a writ was placed in the hands of a sheriff between nine and ten o'clock on a Sunday night, and another writ was delivered to a deputy of his, at fifteen minutes after twelve o'clock, and was executed by the deputy at one o'clock on Monday morning; of which second writ the sheriff had no knowledge until after it was executed; and the service by the deputy held the property in favor of the second attachment. The plaintiff in the first attachment sued the sheriff for not levying it in due time; but it was held, that the attachment was not legally in his hands until the expiration of Sunday, and that his delay in executing it, for one hour after midnight, did not entitle the plaintiff to recover.[1]

[1] Whitney *v.* Butterfield, 13 California, 335.

§ 191 *b*. It not unfrequently happens that no property is found whereon to levy an attachment, and the action proceeds to judgment under the summons. In such case the rendition of the judgment supersedes the attachment, and thereafter no action can be taken under it.[1]

§ 192. Where a variety of articles are attached, and it requires considerable time to complete the service of the process, if the officer, after he has begun it, continues in it with no unnecessary delay until he has secured all the goods, the taking is to be treated as one act. But where an officer took and removed sundry finished carriages, to an amount which he deemed sufficient to secure the demand in the writ, and, on the day following, having changed his mind in regard to some of the property, he determined not to take away a part of the finished carriages he had attached, but, in lieu thereof, to make another attachment of unfinished work, which he did, and then removed the unfinished work, with part of that first attached; it was held, that the attachment might properly be considered as consisting of two distinct acts.[2]

§ 193. An attachment levy effected by unlawful or fraudulent means is illegal and void. Such, for example, is the case of entering a dwelling-house against the owner's will, and attaching his property there; to which more particular reference will presently be made.[3] Such, too, is the case of a plaintiff fraudulently obtaining possession, in one State, of the property of his debtor, and removing it clandestinely into another State, and there attaching it.[4] So, likewise, where the plaintiff decoyed a slave from one State into another, for the purpose of attaching him for the debt of his owner.[5] So, where the officer watched the defendant at work in his field, where he might have served the writ upon him, but did not, and waited till the plaintiff's agent enticed the defendant out of the State, and then attached the defendant's real estate, "for want of his body, goods, and chattels."[6] So, where a suit by attachment was brought in the United States Circuit Court for Louisiana, against one alleged

[1] Scheib *v.* Baldwin, 22 Howard Pract. 278.

[2] Bishop *v.* Warner, 19 Conn. 460.

[3] *Post*, § 200.

[4] Powell *v.* McKee, 4 Louisiana Annual, 108; Paradise *v.* Farmers and Merchants Bank, 5 Ibid. 710; Wingate *v.* Wheat, 6 Ibid. 238; Myers *v.* Myers, 8 Ibid. 369.

[5] Timmons *v.* Garrison, 4 Humphreys, 148.

[6] Nason *v.* Esten, 2 Rhode Island, 337; Metcalf *v.* Clark, 41 Barbour, 45.

to be a citizen of that State, and property was levied on in the interior of the State and brought to New Orleans; and the plaintiff then dismissed that suit, and brought another in the State court, on the ground that the defendant was a non-resident of that State, and levied the attachment on the same property.[1] So, where a sheriff, in a county where he was not an officer, took property, under pretence of having a writ, and carried it to another county, in order to bring it within the reach of legal process.[2] So where, on the suggestion of the counsel for the attachment plaintiff, a trunk was produced and opened, under cover and pretence of a criminal examination then progressing, but really for the purpose of levying an attachment upon money contained in it.[3] So, where a creditor and his debtor lived in the State of New York, where the latter owned a team, which, by the law of that State, was not attachable; and the creditor, for the purpose of enabling himself to attach it in Massachusetts, caused false representations to be made to the debtor, which induced him to take the team into that State, where it was attached; it was held, that the attachment was void, and that both the creditor and the officer who made the attachment were liable as trespassers, though the latter did not know of the fraud, and simply obeyed the terms of his precept.[4]

It was attempted, in Massachusetts, to apply the principle of these decisions to the case of an officer who had levied an attachment against A. on property which he immediately afterwards found not to be A.'s, but B.'s. Upon this appearing, the writ was amended by inserting the name of B., and the officer then, stating that he gave up his former levy, again attached the goods as the property of B. It was contended that he was a trespasser in the second levy, because he was so in the first, and that the first continued until the second was made; but the court held, that as the first levy was not made *for the purpose* of seizing the property under the second levy, and the latter was not effected by means of the former, he could not be charged as a trespasser in making the second levy.[5] In any such case, whether the officer acted with such a purpose, is to be determined from all the facts; and the presumption is in his favor.[6]

[1] Gilbert *v.* Hollinger, 14 Louisiana Annual, 441. See Corning *v.* Dreyfus, 20 Federal Reporter, 426.

[2] Pomroy *v.* Parmlee, 9 Iowa, 140.

[3] Pomroy *v.* Parmlee, 9 Iowa, 140.

[4] Deyo *v.* Jennison, 10 Allen, 410; Chubbuck *v.* Cleveland, 37 Minnesota, 466.

[5] Gile *v.* Devens, 11 Cushing, 59.

[6] Closson *v.* Morrison, 47 New Hamp. 482.

§ 193 *a.* If an attachment be obtained on an affidavit that the defendant *had* disposed of his property with intent to defraud his creditors, and the defendant move to quash it for defects and irregularities; and the plaintiff thereupon makes a new affidavit stating the same ground, and gives a new bond, and obtains a new writ, which is levied on the same property seized under the first one; it is held, that the second levy is valid and effectual because the ground on which each writ was obtained existed under the first, and was a continuing one, and therefore neither writ can be said to have been wrongfully sued out.[1]

§ 194. In executing the writ, the officer should act in conformity to the law under which he proceeds; for, if the service be illegal, no lien is created on the property.[2] He must also perform his duty in such a manner as to do no wrong to the defendant. On such occasions he must be allowed the exercise of some discretion, and is not to be made liable for every trivial mistake of judgment he may make in doubtful cases. But the discretion allowed him must be a sound discretion, exercised with perfect good faith, and with an intent to subserve the interests of both the debtor and the creditor.[3] For, when an officer wholly departs from the course pointed out to him by the law, he may be considered as intending from the beginning to do so, and as making use of the process for a mere pretence and cover; and, therefore, he is liable in the same manner, and for the same damages, as he would have been if he had done the same acts without the legal warrant he abused; he will be considered a trespasser *ab initio*. In other words, he who at first acts with propriety under an authority or license given by law, and afterwards abuses it, shall be considered a trespasser from the beginning.[4] The reason of this rule is, that it would be contrary to sound public policy to permit a man to justify himself at all under a license or authority allowed him by law, after he has abused the license or authority, and used it for improper pur-

[1] Baines *v.* Ullmann, 71 Texas, 529.

[2] Gardner *v.* Hust, 2 Richardson, 601; Buckingham *v.* Osborne, 44 Conn. 133; Fairbanks *v.* Bennett, 52 Michigan, 61.

[3] Barrett *v.* White, 3 New Hamp. 210. In Taylor *v.* Jones, 42 New Hamp 25, the court said · "Such an error or mistake as a person of ordinary care and common intelligence might commit, will not amount to an abuse; but there must be a complete departure from the line of duty, or such an improper and illegal exercise of the authority to the prejudice of another, — such an active and wilful wrong perpetrated, — as will warrant the conclusion that its perpetrator intended from the first to do wrong, and to use his legal authority as a cover for his illegal conduct. Where the acts proved warrant no such conclusion, the person charged with them is not a trespasser."

[4] Barrett *v.* White, 3 New Hamp. 210.

poses. The presumption of law is, that he who thus abuses such an authority assumed the exercise of it, in the first place, for the purpose of abusing it. The abuse is, therefore, very justly held to be a forfeiture of all the protection which the law would otherwise give. Therefore, where an officer attached certain hay and grain in a barn, and, without any necessity, removed the same from the barn at an unfit and unreasonable time, when it must inevitably be exposed to great and unnecessary waste and destruction, it was held, on the principles above stated, to be such an abuse as to render the officer a trespasser *ab initio*.[1]

§ 194 *a*. An officer executing lawful process in a lawful manner can never be a trespasser; even though he knew that the purpose of the plaintiff was, through the instrumentality of the attachment, to restore the property into the possession of other parties, from whom it was withheld by the defendant.[2] But if he act under unlawful process, or execute lawful process in an unlawful manner, he is a trespasser. And whenever he does such acts as authorize his being considered in law a trespasser *ab initio*, all acts done by him in the particular case are unlawful, and he may be held responsible therefor, just as if he had been devoid of any authority, seeming or real. If he has attached property, he cannot hold it if the defendant chooses to reclaim it; or, if he hold it, is liable to the defendant for its value.[3] But if the defendant receive back the property, or it was legally disposed of for his benefit, such fact would, in an action by him against the officer for the trespass, go in mitigation of damages.[4]

§ 195. The officer should be careful not to levy the writ on any property not liable to attachment; for if he do, he will be considered a trespasser.[5] But if, in seizing an article, — as, for instance, a trunk, — he is under a necessity of taking into his possession with it articles exempt from attachment, and if he intermeddles with them to no greater extent than to remove them from the trunk, and deliver them to the owner, or upon the owner's declining to receive them when offered, then to keep

[1] Barrett *v.* White, 3 New Hamp. 210; Peeler *v.* Stebbins, 26 Vermont, 644.

[2] Wakefield *v.* Fairman, 41 Vermont, 339.

[3] Collins *v.* Perkins, 31 Vermont, 624.

[4] *Ante* § 185 *c*, Yale *v.* Saunders, 16 Vermont, 243; Stewart *v.* Martin, Ibid. 397.

[5] Foss *v.* Stewart, 14 Maine, 312; Bean *v.* Hubbard, 4 Cushing, 85; Richards *v.* Daggett, 4 Mass. 534; Gibson *v.* Jenney, 15 Ibid. 205; Kiff *v.* Old Colony, &c. R. R. Co., 117 Ibid. 591; Howard *v.* Williams, 2 Pick. 80; Lynd *v.* Picket, 7 Minnesota, 184; Cooper *v.* Newman, 45 New Hamp. 339.

them safely until called for, he commits no wrong.[1] And if the defendant assent to the attachment at the time, it will be valid; and a subsequent assent will make it good *ab initio*.[2] If the property is a part of a larger quantity than the law exempts, the defendant must set apart such portion as is exempted, and claim it as such, or he will be held to have consented to its being attached.[3]

§ 196. If an officer attach personalty not the property of the defendant, he is, of course, a trespasser on the rights of the owner, who may maintain either trover, trespass, or replevin, against him. Such an attachment is a tortious act, which is itself a conversion; and if trover be brought, no demand on the officer need be proved.[4] And it is such an official misconduct as his sureties in his official bond are liable for.[5] If he acts by the direction of the plaintiff,[6] or of the attorney in the suit,[7] the plaintiff is regarded as equally guilty and equally liable for the trespass; but not if he take no part in the levy,[8] unless he afterward ratify it; and he will be held to have ratified it, when he defends against a claim of property filed by the owner in the attachment suit.[9] And against either officer or plaintiff, where both engage in the act, suit may be brought at once, without any demand or notice,[10] and without the owner being under obligation to take any steps in the suit in which the seizure is made;[11] but if he take such steps, and claim the property in the attachment cause, and recover judgment for its restitution, his right to recover damages for the illegal taking and detention will not be thereby impaired.[12] If, however, after thus claiming the property, he agree with the other parties to the suit, that the officer may sell it, and hold the proceeds subject to the final decision of

[1] Towns *v.* Pratt, 33 New Hamp. 345.

[2] Hewes *v.* Parkman, 20 Pick. 90.

[3] Nash *v.* Farrington, 4 Allen, 157; Clapp *v.* Thomas, 5 Ibid. 158; Smith *v.* Chadwick, 51 Maine, 515.

[4] Woodbury *v.* Long, 8 Pick. 543; Ford *v.* Dyer, 26 Mississippi, 243; Meade *v.* Smith, 16 Conn. 346; Caldwell *v.* Arnold, 8 Minnesota, 265; Sangster *v.* Commonwealth, 17 Grattan, 124; Bodega *v.* Perkerson, 60 Georgia, 516.

[5] People *v.* Schuyler, 4 Comstock, 173; Archer *v.* Noble, 3 Maine, 418; Harris *v.* Hanson, 11 Ibid. 241; Commonwealth *v.* Stockton, 5 Monroe, 192; State *v.* Moore, 19 Missouri, 369; State *v.* Fitzpatrick, 64 Ibid. 185; Van Pelt *v.* Littler, 14 California, 194; Sangster *v.* Commonwealth, 17 Grattan, 124.

[6] Marsh *v.* Backus, 16 Barbour, 483; Corner *v.* Mackintosh, 48 Maryland, 374; Meyer *v.* Gage, 65 Iowa, 606.

[7] Oestrich *v.* Greenbaum, 16 New York Supreme Ct. 242.

[8] Butler *v.* Borders, 6 Blackford, 160; Heidenheimer *v.* Sides, 67 Texas, 32.

[9] Perrin *v.* Claflin, 11 Missouri, 13; Taylor *v.* Ryan, 15 Nebraska, 573.

[10] Tufts *v.* McClintock, 28 Maine, 424; Richardson *v* Hall, 21 Maryland, 399.

[11] Shuff *v.* Morgan, 9 Martin, 592.

[12] Trieber *v.* Blacher, 10 Maryland, 14; Clark *v.* Brott, 71 Missouri, 473.

the controversy, it is considered, in Louisiana, to amount to a waiver of his claim against the officer for damages.[1]

If an officer levy on property not the defendant's, and afterwards, on his own motion, releases the levy, and the attachment plaintiff sues him therefor, the burden is on the officer to show sufficient cause for such release; and if it appear that the property was, in fact, the defendant's, the officer will be held liable therefor to the attachment plaintiff.[2]

§ 196 *a*. That the defendant was not the owner of the property attached, is not good matter for a plea by the defendant in abatement of the suit.[3]

§ 196 *b*. If several attachments be levied at different times on the same property, not being that of the defendant, it is held, that though the owner of the property may sue the officer in trespass for the original taking under the writs first levied, he cannot maintain the action for the subsequent levy under the last attachment, for then the property was already *in custodia legis*.[4]

§ 196 *c*. In any case of an attachment of property not belonging to the defendant, if the property, being perishable, be sold by the officer, he cannot, when sued by its owner, charge the costs and expenses of the attachment and sale against the fund arising from the sale.[5] And where the property belongs to the defendant, and the court orders the attachment to be set aside and vacated, the officer must deliver over the property to the defendant, without attempting to charge him with any of the costs or expenses connected with the seizure and custody of it, except such as the defendant agreed should be so treated. This was so held in New York, notwithstanding section 709 of the Code of Civil Procedure required the officer to "deliver over to the defendant, upon reasonable demand, and *upon payment of all costs, charges, and expenses legally chargeable by the sheriff*, all the attached personal property remaining in his hands." The court held, that in so far as that section of the code attempts to compel a defendant in such case to pay those costs, charges, and expenses, it is unconstitutional and void.[6]

[1] Judson *v.* Lewis, 7 Louisiana Annual, 55.

[2] Wadsworth *v.* Walliker, 51 Iowa, 605.

[3] King *v.* Bucks, 11 Alabama, 217; Sims *v.* Jacobson, 51 Ibid. 186.

[4] Ginsberg *v.* Pohl, 35 Maryland, 505.

[5] Haywood *v.* Hardie, 76 North Carolina, 384.

[6] Bowe *v.* U. S. Reflector Co., 43 New York Supreme Ct. 407.

§ 197. The necessity for the officer's making due inquiry concerning the property he attaches is so highly regarded, that he will be treated as a trespasser for seizing property not belonging to the defendant, even though the owner give him no special notice that the property is his, and make no demand for it.[1] And the remedy of the owner against the officer is not impaired by the owner becoming the receiptor to the officer for the property; for in such case the owner is bound by the terms of the receipt to retain the property and have it ready for delivery on demand; and in an action on the receipt would be estopped from setting up property in himself.[2]

§ 198. What will amount to an attachment, for which trespass may be maintained, may admit of question. In Pennsylvania, the return by an officer that he had attached goods, which appear not to have been the defendant's, subjects the officer to an action of trespass, where the property was bound by the levy, and was in the officer's power, though there was no manual handling or taking them into possession.[3] The same doctrine has been recognized in Massachusetts,[4] and New Hampshire.[5] But where an officer had a writ, and found the defendant in possession of property, and informed him that he was directed to make an attachment; and the defendant informed the officer that the property was not his; and the officer did not take it or interfere with it; and the defendant obtained a receiptor for it; and it did not appear that any return of an attachment was made; it was held, not to amount to a conversion by the officer.[6] So, where an officer attached a quantity of plate-glass, and did not remove it, but, under a statutory provision authorizing such course, deposited a copy of the writ and of his attachment in the town-clerk's office; and thereafter another officer, in like manner, made a second attachment of the property, but did no act to disturb the possession of the officer who made the first levy; it was held, that the first officer could not maintain an action against the second for the conversion of the property.[7]

§ 199. The doctrines of the common law in relation to *confusion of goods* have been partially brought into view and applied,

[1] Stickney v. Davis, 16 Pick. 19.
[2] Robinson v. Mansfield, 13 Pick. 139; Johns v. Church, 12 Ibid. 557.
[3] Parton v. Steckel, 2 Penn. State, 93.
[4] Gibbs v. Chase, 10 Mass. 125; Miller v. Baker, 1 Metcalf, 27; St. George v. O'Connell, 110 Mass. 475.
[5] Morse v. Hurd, 17 New Hamp. 246.
[6] Rand v. Sargent, 23 Maine, 326.
[7] Polley v. Lenox Iron Works, 15 Gray, 513. See Bailey v. Adams, 14 Wendell, 201.

in connection with the execution of attachments. What will constitute a confusion of goods has been the subject of much discussion. Intermixture is not necessarily a convertible term with confusion; for there may be intermixture without confusion, though there can be no confusion without intermixture. Confusion takes place when there has been such an intermixture of similar articles owned by different persons, as that the property of each can no longer be distinguished.[1] Confusion may be predicated of such things as money, corn, or hay, which have nothing in their appearance by which one quantity may be distinguished from another. And so in the case of logs, of the same description of wood and similarly cut.[2] But where the articles are readily distinguishable from each other, there is no confusion; as in the case of cattle,[3] or of crockery-ware and china placed on the same shelf.[4]

When an officer proceeds to execute an attachment, he is authorized to seize any personalty found in the defendant's possession, if he have no reason to suppose it to be the property of another. If it happen that the goods of a stranger are intermixed with those of the defendant, even without the owner's knowledge, the owner can maintain no action against the officer for taking them, until he have notified the officer, and demanded and identified his goods, and the officer shall have delayed or refused to deliver them.[5] In such case the officer cannot be treated as a trespasser for *taking* the goods; but if he sell the whole, after notice of the owner's claim, it will be a conversion, for which trover may be maintained.[6]

[1] Hesseltine *v.* Stockwell, 30 Maine, 237; Tufts *v.* McClintock, 28 Ibid. 424. In Robinson *v.* Holt, 39 New Hamp. 557, the court said: "The doctrine of the confusion of goods has been often discussed, and may be considered as clearly and distinctly settled. If the goods of several intermingled can be easily distinguished and separated, no change of property takes place, and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular, if the portion of each owner is known, and a division can be made of equal proportionate value, as in the case of a mixture of corn, coffee, tea, wine, or other article of the same kind and quality, then each may claim his aliquot part; but if the mixture is undistinguishable, because a new ingredient is formed, not capable of a just appreciation and division according to the original rights of each, or if the articles mixed are of different values or quantities, and the original values or quantities cannot be determined, the party who occasions, or through whose fault or neglect occurs the wrongful mixture, must bear the whole loss."

[2] Loomis *v.* Green, 7 Maine, 386; Hesseltine *v.* Stockwell, 30 Ibid. 237.

[3] Holbrook *v.* Hyde, 1 Vermont, 286.

[4] Treat *v.* Barber, 7 Conn. 274.

[5] Tufts *v.* McClintock, 28 Maine, 424; Wilson *v.* Lane, 33 New Hamp. 466.

[6] Lewis *v.* Whittemore, 5 New Hamp. 364; Albee *v.* Webster, 16 Ibid. 362; Shumway *v.* Rutter, 8 Pick. 443.

If a party wilfully intermingle his goods with those of another so that they cannot be distinguished, the other party is, by the principles of the common law, entitled to the entire property, without liability to account for any part of it.[1] In that case, an officer cannot attach any of the goods for a debt of him who caused the intermixture;[2] but may attach the whole for the debt of the innocent party; and if the former would reclaim his property by law, the burden of proof is on himself to distinguish his goods from those of the defendant.[3] If he know of the attachment, and fail to notify the officer of his claim, he cannot subject the officer to any accountability for the seizure.[4] Much less can he do so when he has claimed the whole property, instead of pointing out to the officer the particular part of it belonging to him.[5]

If an officer be notified, or have reason to believe, that goods of a stranger are intermingled with those of a defendant, it is his duty to make proper inquiry, with a view to avoid seizing property not the defendant's. He may require the claimant to point out his property, and if, being able to do so, he refuse, the officer may seize the whole, without liability to be proceeded against for a tort.[6] When, however, an officer having an attachment against A., undertakes to levy it on property in the hands of B., upon the assumption that B.'s title is fraudulent, and that the property is really A.'s; and the goods he seeks to reach are intermingled with others of a similar kind, which, without dispute, belong to B.; he cannot demand of B. to select what is undisputably his; and a refusal by B. to make such selection will

[1] Ryder *v.* Hathaway, 2 Pick. 298; Willard *v.* Rice, 11 Metcalf, 493; 2 Kent's Com. 364; Story on Bailments, § 40; Beach *v.* Schmultz, 20 Illinois, 185; Robinson *v.* Holt, 39 New Hamp. 557; Taylor *v.* Jones, 42 Ibid. 25. In Smith *v.* Sanborn, 6 Gray, 134, the court said: "A change of ownership does not necessarily ensue from the mere intermixture of property belonging to different individuals. Their rights as owners may remain unaffected after it has taken place. Each one of them is still at liberty to reclaim what had before belonged to him, if it can be distinguished and separated from the rest; or may insist on receiving his just proportion of the whole, when the several parcels of which it consists, though they have become indistinguishable, are of substantially the same quality and value. It is only in those cases where the intermixture has been caused by the wilful or unlawful act of one of the proprietors, and the several parcels have thereby become so combined or mingled together that they can no longer be identified, that his interest in them is lost."

[2] Beach *v.* Schmultz, 20 Illinois, 185.

[3] Loomis *v.* Green, 7 Maine, 386; Wilson *v.* Lane, 33 New Hamp. 466; Robinson *v.* Holt, 39 Ibid. 557; Weil *v.* Silverstone, 6 Bush, 698.

[4] Bond *v.* Ward, 7 Mass. 123; Lewis *v.* Whittemore, 5 New Hamp. 364; Wilson *v.* Lane, 33 Ibid. 466.

[5] Smokey *v.* Peters-Calhoun Co., 66 Mississippi, 471.

[6] Sawyer *v.* Merrill, 6 Pick. 478; Albee *v.* Webster, 16 New Hamp. 362.

not justify an attachment of the whole; unless B. made the intermixture fraudulently, and with the intention of frustrating the attachment.[1]

To justify an attachment of the goods of a stranger, on the ground of intermixture, it is incumbent on the officer to show that the goods were of such character, or, at least, that there was such an intermixture, that they could not, upon due inquiry, be distinguished from those of the defendant.[2]

The necessity for inquiry in such cases is strongly insisted on by the courts, particularly in cases where the officer has reasonable ground for a belief that, in executing the writ, he may seize the property of a stranger, who is not present to assert his rights, and does not know of the seizure. Therefore, where an officer, under such circumstances, made no inquiry at all, and there was strong internal evidence, in the manner of his advertising the property for sale, that he must have been apprised of a defect in the defendant's title, it was held, that the owner might maintain trespass against him for taking the property.[3]

When a third party claims that his goods are intermingled, and have been attached, with those of the defendant, and exhibits to the officer a bill of sale of articles, and there are other articles of a like kind attached, so as that those of the claimant are undistinguishable, the officer will be justified in selecting and giving up the least valuable articles corresponding with the bill of sale.[4]

§ 200. An officer having an attachment may enter the store of a third person where goods of the defendant are, for the purpose of executing the writ, and may even break open the door, if refused admittance on request, and may remain there long enough to seize, secure, and inventory the goods; and if the owner of the store resist or oppose him, he may use whatever force is necessary to enable him to perform his duty;[5] but in such case, he is not entitled, without the consent of the proprietor, to make use of the tenement to keep the attached property in;[6] but must

[1] Treat v. Barber, 7 Conn. 274.

[2] Walcott v. Keith, 2 Foster, 196; Wilson v. Lane, 33 New Hamp. 466; Morrill v. Keyes, 14 Allen, 222.

[3] Sibley v. Brown, 15 Maine, 185; Smith v. Sanborn, 6 Gray, 134; Carlton v. Davis, 8 Allen, 94; Morrill v. Keyes, 14 Ibid. 222; Gilman v. Hill, 36 New Hamp. 311.

[4] Shumway v. Rutter, 8 Pick. 443.

[5] Haggerty v. Wilber, 16 Johnson, 287; Fullerton v. Mack, 2 Aikens, 415; Platt v. Brown, 16 Pick. 553; Burton v. Wilkinson, 18 Vermont, 186; Perry v. Carr, 42 Ibid. 50; Messner v. Lewis, 20 Texas, 221; Solinsky v. Lincoln S. Bank, 85 Tennessee, 368.

[6] Rowley v. Rice, 11 Metcalf, 337.

remove it therefrom as soon as it can reasonably be done, or he will be considered a trespasser.[1] And where the defendant is the proprietor of the store, and offers no resistance to the levy, the officer has no right to eject him from the store, or to retain possession thereof longer than is necessary to make a proper attachment of the goods.[2] In every such case, if there be any person present to grant admittance,[3] a demand for it must precede resort to force. If the demand be made upon the person having the key of the building, it is all that is necessary; and the officer is not bound to inquire how, or in what way, such person became possessed of the key.[4] But if, in such case, the officer take entire possession of the building, excluding the owner, he may, as respects the owner, be regarded as a trespasser *ab initio*.[5]

§ 200 *a*. When, however, the matter of forcing an entrance into a dwelling-house, for the purpose of attaching property of the owner, is presented, the law takes different ground, and not only declares such forcing an unlawful act, but that the attachment made by means of it is unlawful and invalid.[6] And this was held to apply to the case of a party living in a tenement house, which was let in distinct portions to several tenants who used in common the entry and stairway. It was decided that, in such case, an officer who has entered through the outer door into the entry, has no right to break open the door of one of the rooms of a tenant, in order to attach the property of a third person therein.[7] But in Vermont, if the property of a stranger be secreted in a dwelling-house, it is held, that the officer may proceed as in the case of a store.[8]

§ 201. In Maine, it was attempted to establish the doctrine that an officer who levies an attachment on property of greater amount in value than the debt to be secured, transcends his authority and becomes a trespasser *ab initio*, and therefore that the attachment is invalid. But the court held, that it did not necessarily follow that the officer acted oppressively or illegally, because he attached more property than was necessary to satisfy the attachment; that if he acted oppressively, he might be liable

[1] Malcom *v.* Spoor, 12 Metcalf, 279; Williams *v.* Powell, 101 Mass. 467; Davis *v.* Stone, 120 Ibid. 228.

[2] Perry *v.* Carr, 42 Vermont, 50.

[3] Clark *v.* Wilson, 14 Rhode Island, 11.

[4] Burton *v.* Wilkinson, 18 Vermont, 186.

[5] Fullerton *v.* Mack, 2 Aikens, 415; Newton *v.* Adams, 4 Vermont, 437.

[6] Ilsley *v.* Nichols, 12 Pick. 270; People *v.* Hubbard, 24 Wendell, 369.

[7] Swain *v.* Misner, 8 Gray, 182.

[8] Burton *v.* Wilkinson, 18 Vermont, 186.

to an action by the party injured; but that third persons could not interpose and claim to set aside the attachment for that cause.[1] In Texas, it was held, that if an officer wilfully seizes many times as much goods as are necessary to satisfy the debt sued on, and deprives the defendant of the possession and use of them, he commits as flagrant a wrong as if he had seized the excess without any process whatever, and is liable to damages as a trespasser.[2] If an officer make an excessive levy, that will not authorize a release of the property attached; but it is his duty to retain sufficient to satisfy the claim, and discharge the rest.[3]

§ 202. An officer should not do any act, at the time of making an attachment, which could be construed into an abandonment of the attachment; if he does so, the attachment will be a nullity. Thus, where an officer having an attachment got into a wagon in which the defendant was riding, and told the defendant that he attached the horse harnessed to the wagon, and then rode down street with the defendant, without exercising any other act of possession, and left the horse with the defendant, upon his promising to get a receiptor for it; it was held, that, as the horse had not been under the officer's control for a moment, or, if it could be considered that he had had an instantaneous possession, it was as instantaneously abandoned, there was no attachment.[4]

§ 203. A question arises as to the right of an attaching officer to use the property attached, and the consequences to him of such use. In Vermont, if he use the property — as, for instance, a horse — sufficiently to pay for its keeping, he cannot require pay for such keeping;[5] and the court there seemed to regard such use as perhaps admissible to that extent; but as an unsafe and pernicious proceeding, not to be countenanced.[6] Aside from this question, however, there can be no doubt that if the officer, or his bailee, use the property, so that its value is thereby impaired, he becomes by such use a trespasser *ab initio*.[7] But the doctrine does not appear to have been extended to any case, except where there was a clear, substantial violation of the owner's rights, and

[1] Merrill *v.* Curtis, 18 Maine, 272.
[2] Hilliard *v.* Wilson, 65 Texas, 286.
[3] Wadsworth *v.* Walliker, 51 Iowa, 605.
[4] French *v.* Stanley, 21 Maine, 512.
[5] Dean *v.* Bailey, 12 Vermont, 142.
[6] Lamb *v.* Day, 8 Vermont, 407.
[7] Lamb *v.* Day, 8 Vermont, 407; Briggs *v.* Gleason, 29 Ibid. 78; Collins *v.* Perkins, 31 Ibid. 624.

of such a character as to show a wanton disregard of duty on the part of the officer, or his bailee, either where the property was injured, or had been used by an officer for his own benefit, or for the benefit of some one other than the attachment debtor. Therefore, where an officer attached a horse, wagon, and harness, and immediately put them to use in removing other personal property of the debtor, attached by him at the same time, and it appeared that they were not thereby injured, it was held, that for such use he was not liable as a trespasser *ab initio*. And where it appeared that the officer was seen driving the horse along the highway, the next day after the attachment, and there was no proof of the purpose of such driving, it was considered that it should not be presumed to have been for an unlawful purpose.[1]

§ 204. The officer having duly levied the attachment, his next duty is to make return of it. If he fail to do so, two questions may arise: 1. As to its effect on the attachment; and 2. As to its bearing on his right to justify under the writ. In the former case, under peculiar statutes, as in New Jersey, the attachment may be fruitless, if the return be not made in conformity with the statutory requirement;[2] but ordinarily the failure to make return will not affect the plaintiff's lien under the attachment;[3] and the officer will usually be allowed to make his return *nunc pro tunc*.[4] But when he undertakes to justify the taking of property under the writ, his position is different, and different rules prevail, as is hereinafter shown.[5]

If the return do not on its face show when it was made, the legal intendment, in the absence of proof to the contrary, would be that it was made on or before the return day.[6] The return can be made only by the officer to whom the writ was directed. A return made by another officer is void.[7] And though that may be written upon the process, which, if signed by the officer, would be a return, yet if not signed, it is no return, and therefore there is no attachment.[8] And as his return is in general conclusive against him, and cannot be disproved by parol evidence,[9] it

[1] Paul *v.* Slason, 22 Vermont, 231.

[2] Tomlinson *v.* Stiles, 4 Dutcher, 201; 5 Ibid. 426.

[3] Reed *v.* Perkins, 14 Alabama, 231; Ritter *v.* Scannell, 11 California, 238; City Nat Bank *v.* Cupp, 59 Texas, 268; Riordan *v.* Britton, 69 Ibid. 198.

[4] Bancroft *v.* Sinclair, 12 Richardson, 617.

[5] *Post*, § 210 *a*.

[6] Anderson *v.* Graff, 41 Maryland, 601.

[7] Olney *v.* Shepherd, 8 Blackford, 146.

[8] Clymore *v.* Williams, 77 Illinois, 618; Wilkins *v.* Tourtellott, 28 Kansas, 825.

[9] Paxton *v.* Steckel, 2 Penn. State, 93; French *v.* Stanley, 21 Maine, 512; Haynes *v.* Small, 22 Ibid. 14; Denny *v.* Willard, 11 Pick. 519; Brown *v.* Davis, 9 New Hamp. 76; Clarke *v.* Gary, 11 Alabama, 98; Chadbourne *v.* Sumner, 16 New

is important, not only to the parties interested, but to himself, that it should be made with great care. In Maine the court used this language: "Officers ought to know what they attach, and to be holden to exactness and precision in making their returns. Neither the debtor nor the creditor would be safe if it were otherwise. And it is well that the law should be so promulgated and understood. An officer in such cases is intrusted with great power. He may seize another man's property, without the presence of witnesses, whether it be goods in a store, or elsewhere; and safety only lies in holding him to a strict, minute, and particular account. To hold that he may, indifferently, make return of his doings at random, and afterwards be permitted to show that what he actually did was entirely different, would be opening a door to infinite laxity and fraud, and mischiefs incalculable." The court, acting on these views, held, where the officer had returned an attachment of 175 yards of broadcloth, and was sued for not having the cloth forthcoming on execution, that he could not give evidence that he had attached all the broadcloths in the defendant's possession; that the whole of the broadcloths so attached amounted to no more than thirty yards; and that by mistake he over-estimated the number of yards in the lot.[1]

§ 205. The return should state specifically what the officer has done; and, where the manner of doing it is important, it should be set forth, that the court may judge whether the requirements of the law have been complied with. It does not answer for the officer, in such case, to return that he attached; he should return his doings and leave the court to determine whether they constituted an attachment.[2] Neither should he return that he executed the writ as the law directs; for that is but his opinion of his own acts.[3] But where the officer returned that he had "levied" the writ on certain personal property, it was held, that the term could only mean a legal levy, which included a seizure of the property.[4]

Hamp. 129; State v. Penner, 27 Minnesota, 269; Ryan Drug Co. v. Peacock, 40 Ibid. 470; Harvey v. Foster, 64 California, 296.

[1] Haynes v. Small, 22 Maine, 14. See Clarke v. Gary, 11 Alabama, 98.

[2] Gibson v. Wilson, 5 Arkansas, 422; Desha v. Baker, 8 Ibid. 509; Jeffries v. Harvie, 38 Mississippi, 97; Crizer v. Gorren, 41 Ibid. 563; Ezelle v. Simpson, 42 Ibid. 515; Rankin v. Dulany, 43 Ibid. 197; Moore v. Coates, Ibid. 225. *Sed contra*, Boyd v. King, 36 New Jersey Law, 184.

[3] Stockton v. Downey, 6 Louisiana Annual, 581; Page v. Générès, Ibid. 549; Desha v. Baker, 8 Arkansas, 509; Crisman v. Swisher, 4 Dutcher, 149.

[4] Baldwin v. Conger, 9 Smedes & Marshall, 516.

§ 206. Though an officer's return is in general conclusive against him,[1] yet where it states a thing which, from the nature of the case, must be a matter of opinion only, he is not concluded by it, but may explain it by parol evidence. Thus, where the return affixes a value to the goods levied on, the officer will not be concluded by it;[2] but it will be considered *prima facie* a just and fair valuation, and the *onus* will rest on him to establish the contrary.[3] So, where a sheriff returned that he had attached certain goods, at the hour of five o'clock; it was held, that the return was *prima facie* indicative of the true time, and might, if no other standard could be found, be conclusive on him; but that it was impossible for the sheriff to know, from his judgment or his watch, that five o'clock was the exact period of the levy, and his opinion on this point, unnecessarily returned, ought not to be considered as a conclusive averment of fact, but might be explained by parol testimony showing the moment when the levy took place.[4]

§ 207. It is proper that the return should state that the property levied on was the property of the defendant. What effect is due to the absence from the return of such a statement? This question has come up in various forms, both as to real and personal property.

In Virginia, on appeal from a judgment rendered against a defendant without service on or appearance by him, the judgment was reversed because the return did not state that the property attached — which was personalty — was the defendant's.[5]

In Kentucky, in a similar case, the court considered the return bad, but did not reverse the judgment, because after it was rendered, the officer had, by leave of the court, amended his return, remedying the defect.[6]

In Texas, a purchaser of real estate from the owner thereof, without notice of a pending attachment levied thereon, sought relief in equity against the judgment in the attachment suit, as a cloud upon his title; which brought up the question of the validity of the attachment proceedings. Two points were presented: the sufficiency of the description in the sheriff's return to identify the property; and the effect of the absence from the

[1] *Ante*, § 204.
[2] Denton *v.* Livingston, 9 Johnson, 96.
[3] Pierce *v.* Strickland, 2 Story, 292.
[4] Williams *v.* Cheesborough, 4 Conn. 356.
[5] Clay *v.* Neilson, 5 Randolph, 596. See Robertson *v.* Hoge, 83 Virginia, 124; Offtendinger *v.* Ford, 86 Ibid. 917.
[6] Mason *v.* Anderson, 3 Monroe, 293. In Missouri, the court incidentally expressed the same view. Anderson *v.* Scott, 2 Missouri, 15.

return of any statement that the property levied on was the defendant's. Both were held to be "defects of so grave a character that no lien on the property was created by virtue of the attachment; *at least as against a purchaser from the defendant, without actual notice of the attachment proceedings.*"[1] But where a motion was made, in that State, to quash an attachment, because the sheriff did not state in his return that the property levied on was the property of the defendant, it was held to be no ground for quashing the writ.[2]

In Kansas, a purchaser of a steamboat from the owner, pending an attachment against the latter, of which the purchaser had knowledge, and under which the boat had been seized, took the boat from the sheriff by a writ of replevin. The sheriff, in support of his possessory right, offered in evidence the record of the judgment in the attachment suit and the order of repossession to him therein. By this record it appeared that the attachment proceeding was without service of process upon the defendant, who was a non-resident; though he was notified by publication; and that the sheriff's return did not state whose property the boat was. The court below ruled out the record as evidence; and the Supreme Court sustained that ruling, upon the ground that, as it did not appear that any property of the attachment defendant had been attached, there was no authority in the court out of which the attachment issued to render any judgment whatever in the attachment suit.[3]

Such are the cases on that side of the question.

On the other hand, there are cases in New York, Alabama, Mississippi, and Iowa.

In New York, on *certiorari* to bring up proceedings in attachment before a justice of the peace, where judgment was rendered without service of process upon the defendant, it was objected that the constable's return did not show that the property levied on was the defendant's. The case was like those in Virginia and Kentucky, just referred to. The court held the return sufficient; considering the fair and reasonable intendment to be, that the property taken belonged to the defendant.[4]

In Alabama, judgment was rendered against an absent defendant, without service of process upon or notice to him. On error,

[1] Meuley *v.* Zeigler, 23 Texas, 88. In Stoddart *v.* McMahan, 35 Texas, 267, the court adhered to its previous position where the suit was brought by attachment, but held the rule inapplicable to an ancillary attachment, in aid of a suit in which the defendant had been served with summons.

[2] Willis *v.* Mooring, 63 Texas, 340.

[3] Repine *v.* McPherson, 2 Kansas, 340.

[4] Johnson *v.* Moss, 20 Wendell, 145.

it was sought to reverse this judgment, upon the ground that the sheriff's return of the levy of the writ of attachment did not state that the property seized was the defendant's, — the same kind of case as those in Virginia, Kentucky, and New York. The point was overruled, the court thus expressing itself: "The sheriff is an officer placed under great responsibility by the law, which defines his duties. He pledges to the public, under the solemnity of an oath, his integrity and diligence; and consequently every reasonable intendment must be made in favor of the regularity of his official acts. When he receives process requiring him to levy upon the property of a particular individual, and he returns it according to its mandate, with his indorsement stating that he has levied the same on property (particularly describing it), we must intend that the property seized belonged to the defendant; because the process only authorized a levy upon his effects."[1] In a subsequent similar case, where real estate was attached, the court applied the same doctrine, holding the principle applicable to all cases alike.[2]

In Mississippi, on a motion to quash a sheriff's return of attachment of real estate, because it failed to state that the property was the defendant's, the court cited and followed the ruling in Alabama.[3]

In Iowa, in conflicts between titles to real estate derived from the same party, on the one side by his conveyance, and on the other through *ex parte* attachment proceedings, the Supreme Court first held, that those proceedings imparted no title, where the sheriff's return did not state that the property levied on was the defendant's;[4] but afterwards this position was abandoned, and the same ground taken, substantially, as in New York and Alabama.[5]

Such are the decisions on this side of the question. Different in facts, and not so directly in point, are cases in Maine and Wisconsin.

In the former State, one claimed title through an attachment, which the officer had returned levied on property "supposed" to belong to the defendant; and it was held, that the qualifying term "supposed" did not impair the effect of the attachment.[6]

In the latter State, under a writ against S. and E., real estate

[1] Bickerstaff *v.* Patterson, 8 Porter, 245. See Kirksey *v.* Bates, 1 Alabama, 303; Miller *v.* McMillan, 4 Ibid. 527; Thornton *v.* Winter, 9 Ibid. 613; King *v.* Bucks, 11 Ibid. 217.

[2] Lucas *v.* Godwin, 6 Alabama, 831.

[3] Saunders *v.* Columbus Life Ins. Co., 43 Mississippi, 583.

[4] Tiffany *v.* Glover, 3 G. Greene, 387.

[5] Rowan *v.* Lamb, 4 G. Greene, 468.

[6] Bannister *v.* Higginson, 15 Maine, 73.

was attached, and returned as the property of E., when, in fact, it was that of S. The attachment suit proceeded to judgment against both, and the property was sold under execution. In a suit between the purchaser at that sale, and a purchaser from S., it was held, that the title through the attachment proceedings was not vitiated by the return of the property as E.'s, when it was, in fact, that of S.[1]

§ 208. By the general principles of law, independent of any statutory regulation, the officer is bound to give, as nearly as it can reasonably be done, in his return, or in a schedule or inventory annexed thereto, a specific description of the articles attached, their quantity, size, and number, and any other circumstances proper to ascertain their identity.[2] If he give such description in his return, it is not necessary that he should accompany it with a separate schedule, though the statute require him to return the writ, "with his return indorsed thereon, and a schedule of the property attached."[3] It does not seem, however, that any more precision should be exhibited in the return than is necessary for the identification of the property. Hence, where a sheriff returned an attachment of four horses (describing their color), as the property of the defendant, it was held sufficient.[4] So, where an officer returned that he had attached all the "stock of every kind" in a woollen factory particularly described, specifying the stock as a "lot of dye-wood and dye-stuff," — "lot of clean wool," — "sixteen pieces of black Oxford mixed cassimere," — "twenty-five pieces doeskins and tweeds," — "fifty-one pieces of unfinished cloth," — "lot of cotton-wool," — "lot of colored wool," — "cotton-wool, oils," &c., "in said woollen-factory," — the return was held sufficient.[5] But a return of an attachment of "a stock of goods, wares, and merchandise," without any specification thereof, either in the return or in an annexed schedule, was held insufficient.[6] So, where an officer returned an attachment of "all the wood, hay, bark, and lumber in the town of W. in which the defendant has any right, title, interest, or estate," it was held to be too indefinite to amount to an attachment of a quantity of hay in a barn, though,

[1] Robertson v. Kinkead, 26 Wisconsin, 560.

[2] Pierce v. Strickland, 2 Story, 292; Baxter v. Rice, 21 Pick. 197; Haynes v. Small, 22 Maine, 14; Toulmin v. Lesesne, 2 Alabama, 359.

[3] Pearce v. Baldridge, 7 Arkansas, 413.

[4] Gary v. McCown, 6 Alabama, 370. See Wharton v. Conger, 9 Smedes & Marshall, 510; Silver Bow M. & M. Co. v. Lowry, 5 Montana, 618.

[5] Ela v. Shepard, 32 New Hamp. 277.

[6] Messner v. Lewis, 20 Texas, 221.

at the time, the officer put up a paper on the barn, with the following notice upon it: "I have attached all the hay in this barn in which S. (the defendant) has any interest."[1] A failure to specify the articles attached will, however, subject the officer to nominal damages only, unless special damage be shown;[2] and will not in any case authorize the attachment to be quashed.[3]

§ 209. Unless required by statute, it is no part of an officer's duty to affix a valuation to the property he attaches.[4] We have just seen that the statement of a valuation will, however, be *prima facie* evidence, as against him, of its own correctness.[5] The omission to affix a value, when he is not bound to state it, can hardly in any case prejudice the officer. In such an extreme case as arose in Maine, where there was an entire absence of all evidence of the value of the property, it would probably be held, as it was there, that the property was of the value commanded to be attached.[6]

§ 210. Where an officer is a party either claiming or justifying under his own official acts, his return must be received as evidence; otherwise it would be impossible, in most cases, to prove an attachment of property on *mesne* process, or its seizure on execution. The officer might produce his precept and show his return upon it, but if this be not *prima facie* evidence, he could never prove the attachment, unless he took, or happened to have with him, a witness to prove the truth of his return. It may therefore be laid down as an unquestioned rule, that the returns of sworn officers, acting within the sphere of their official duty, are always competent evidence, and are to be presumed to be correct, until the contrary be shown.[7] In New

[1] Bryant *v.* Osgood, 52 New Hamp. 182. The court said: "The return gave information that he had attached all the hay in the town of W. in which S. had any interest; but with regard to quantity, or any particular location, and whether the hay was in one or more different lots or localities, there was no specification in the return; and if, after the filing of this return, a purchaser, or a subsequent attaching creditor, should find a quantity of hay, either upon or not upon the premises occupied by S., he could have no knowledge or information, derived from an inspection of the records, as to whether such lot of hay had been attached or not; and a dispute would instantly arise between the purchaser, or subsequent attaching creditor, and the officer, as to the identity of the property; and infinite confusion would result, contrary to the demands of public policy."

[2] Bruce *v.* Pettengill, 12 New Hamp. 341.

[3] Green *v.* Pyne, 1 Alabama, 235.

[4] Pierce *v.* Strickland, 2 Story, 292.

[5] *Ante*, § 206.

[6] Childs *v.* Ham, 23 Maine, 74.

[7] Bruce *v.* Holden, 21 Pick. 187; Sias *v.* Badger, 6 New Hamp. 393; Nichols *v.* Patten, 18 Maine, 231; Polley *v.* Lenox

Hampshire, as between the officer and a trespasser, an officer's return of an attachment of personal property is equivalent to a return of all the facts and acts done, which are required to constitute a valid attachment, and is conclusive of the fact, and cannot be disproved by parol evidence.[1] And so, in Maine, where in an action of replevin against him, he sets up the attachment as a defence.[2] But if an officer, in his return, state matters outside of what he had done under the writ and in lawful execution of it, the return is not admissible evidence of those matters: it is admissible evidence only of what the law required him to show in it.[3]

§ 210 *a*. An officer who justifies the taking of property under an attachment must show that the attachment was actually returned at the time when it was, by law, returnable. If the action against him be brought, and a trial therein had, before the writ under which he acted is returnable, the production of the writ, with his return thereon, will be sufficient, because he is the proper custodian of the writ until the return day. But if he fails to make his return in the time required by law, he cannot justify under it, whether the action be brought before or after the return day.[4] But where, by a settlement between the parties, it is agreed that the property shall be restored to the defendant, and the writ shall not be returned, the officer, when sued for making the attachment, will not be precluded, by his failing to return the writ, from justifying under it.[5] And when property attached is surrendered at the request of the defendant, and money is substituted therefor as an equivalent, the substitution operates as an accord and satisfaction of any claim of the defendant against the officer for attaching the property, and enables the officer to justify under the writ, although it was not returned.[6]

§ 210 *b*. Where an officer justifies under an attachment, a misdescription in his return of an article of personal property attached will not vitiate the attachment, if the appearance and use of the article are such that it may have been naturally and

Iron Works, 4 Allen, 329; Chadbourne *v.* Sumner, 16 New Hamp. 129; Chapline *v.* Robertson, 44 Arkansas, 202.

[1] Brown *v.* Davis, 9 New Hamp. 76; Morse *v.* Smith, 47 Ibid. 474; Lathrop *v.* Blake, 3 Foster, 46; Hensley *v.* Rose, 76 Alabama, 373.

[2] Smith *v.* Smith, 24 Maine, 555.

[3] Charles City P. & M. Co. *v.* Jones, 71 Iowa, 234.

[4] Russ *v.* Butterfield, 6 Cushing, 242; Williams *v.* Babbitt, 14 Gray, 141.

[5] Paine *v.* Farr, 118 Mass. 74.

[6] Taylor *v.* Knowlton, 10 Allen, 137.

in good faith so misdescribed. And this is not a question of law to be decided by the court, but of fact to be tried by a jury.[1]

§ 211. When an attachment has been returned, the return is beyond the reach of the officer and of the court into which it is made, unless a proper case be presented for the court to grant leave to amend it. The court will not order a return to be set aside, on the application of a party to the cause, averring its incorrectness;[2] nor can a court, where one tract of land is attached, and so returned, require the officer, by rule, to substitute a different tract.[3]

§ 211 *a*. If, after a return has been made, the officer, without leave of court, make a material alteration therein, the alteration cannot affect the rights of the parties. Thus, in an action on an attachment bond, the question was as to what property had been levied on by the officer. The return indorsed on the writ was in these words: "Executed by levying on 250 bushels of corn, more or less, 300 lbs. cotton, *2 mules, 2 cast-plows, 2 B. T. stocks, 2 sweep-hoes, 1 side-harrow, 2 pr. gears, 2 bridles, and 2 whiffle-trees.*" The italicized words had a line drawn across them in different ink. The plaintiff offered to read the whole return to the jury; but the court excluded the italicized words. He then offered to prove that the articles specified in those words were actually levied on; but this evidence was excluded. The Supreme Court held these rulings erroneous, and said: "Records are open to inspection, and not only parties, but other persons have access to them. It would shock common justice, if, under these circumstances, a record is altered, and a party, having rights dependent upon its truth, is not permitted to show the alteration by extrinsic evidence. When the return of an officer, or any record, has been altered or spoliated, by design or mistake, the most ample opportunity, and the widest scope of legitimate investigation, should be allowed for the detection of the fraud, or the discovery of the mistake. . . . An altered record bearing a suspicious appearance does not import verity, but rather fallacy. The burden is on the party claiming under it to explain the alteration; and the party to whose prejudice it has been changed has the right to show the alteration, when the true and original record has been used to his wrong, and his adver-

[1] Briggs *v.* Mason, 31 Vermont, 433.
[2] Maris *v.* Schermerhorn, 3 Wharton, 13.
[3] Steinmetz *v.* Nixon, 3 Yeates, 285.

sary seeks to escape responsibility under cover of the altered record."[1]

§ 212. As a general proposition, every court may allow amendments of returns upon its process. All applications for the exercise of this power are addressed to the sound legal discretion of the court, to be determined by the nature and effect of the proposed amendments;[2] and being so, a refusal to allow an amendment is not error.[3] And though amendments may be allowed, which on consideration may appear of doubtful expediency, yet if they are permitted in the legal exercise of a discretion, their propriety will not in general be questioned on exceptions. But if the amendment be one which the law does not authorize, it is otherwise.[4] The exercise of this discretion is, in the absence of power conferred by statute, confined to the court out of which the process issued; therefore a superior court has no right, on a trial before it, to permit a return made to an inferior court to be amended.[5]

§ 213. An officer cannot, as a matter of *right*, amend a return he has once duly made. This would be to place at his discretion the verity and consistency of records, and the effect and authority of the most solemn judgments.[6] But until the process is actually deposited in the clerk's office, the return does not become matter of record, even though the officer keep the process in his possession long after the time when it should be returned; and until the return is actually made, the process is under his control and in his power, and he does not need the authority of the court to amend it.[7]

§ 214. If the amendment is sought in a mere matter of form, such as affixing the signature of the officer to a return already written out, but which by oversight was not signed, there can be no good reason why it should not be allowed.[8] And where the

[1] Hensley *v.* Rose, 76 Alabama, 373.

[2] Miller *v.* Shackleford, 4 Dana, 264; Fowble *v.* Walker, 4 Ohio, 64; Palmer *v.* Thayer, 28 Conn. 237; Hill *v.* Cunningham, 25 Texas, 25.

[3] Planters' Bank *v.* Walker, 3 Smedes & Marshall, 409.

[4] Fairfield *v.* Paine, 23 Maine, 498.

[5] Smith *v.* Low, 2 Iredell, 457; Harper *v.* Miller, 4 Ibid. 34; Brainard *v.* Burton, 5 Vermont, 97.

[6] Miller *v.* Shackleford, 4 Dana, 264; Palmer *v.* Thayer, 28 Conn. 237; Hill *v.* Cunningham, 25 Texas, 25. In Morris *v.* Trustees, 15 Illinois, 266, it was held that amendments by sheriffs of their returns are of course.

[7] Welsh *v.* Joy, 13 Pick. 477.

[8] Dewar *v.* Spence, 2 Wharton, 211; Childs *v.* Barrows, 9 Metcalf, 413; Wilkins *v.* Tourtellott, 28 Kansas, 825. In Tennessee it was held, that the indorse-

mistake is a mere slip of the pen, manifest on the face of the record, and concerning which no party who examined the record could doubt, the officer will be allowed to amend, even after final judgment in the cause.[1]

§ 215. When an amendment is allowed, it relates, as between the parties to the suit, to the time when the original return was made;[2] and the amendment and the original will, if necessary to a proper understanding of the doings of the officer, be considered as one return.[3]

§ 216. There are numerous decisions bearing on the subject of amendments of returns on *final* process, which may have more or less analogy to the subject now before us; but it is deemed advisable to consider here only those which refer to *mesne* process. In Mississippi, it is held to be error to permit a sheriff to amend his return, after judgment,[4] or after the return term of the writ, without notice to the adverse party,[5] or after his term of office has expired.[6] In Iowa, a sheriff was allowed to amend a return after the expiration of his term of office.[7] In Virginia, it has been decided that the court ought to permit a sheriff to amend his return upon a writ of *ad quod damnum*, at any time before judgment on it;[8] and in Kentucky, a like amendment was allowed several years after the writ was executed, there being the inquest to amend by.[9] In Kentucky, a sheriff may amend his return of an attachment, so as to show that the effects attached were the property of the defendant, as well before as after judgment, and at a subsequent term;[10] and may amend his return on a petition and summons, after a writ of error is sued out to reverse the judgment.[11] In Massachusetts, an amendment, in one case, was allowed after verdict;[12] and in another case, where the return stated an attachment of property, and a garnishment, but omitted to state any service upon the

ment of the sheriff's return on the writ without his signature was a good levy. Lea *v.* Maxwell, 1 Head, 365.

[1] Johnson *v.* Day, 17 Pick. 106.

[2] Smith *v.* Leavitts, 10 Alabama, 92; Kitchen *v.* Reinsky, 42 Mississippi, 427; Hill *v.* Cunningham, 25 Texas, 25.

[3] Layman *v.* Beam, 6 Wharton, 181.

[4] Hughes *v.* Lapice, 5 Smedes & Marshall, 451.

[5] Dorsey *v.* Pierce, 5 Howard, (Mi.), 173; Williams *v.* Oppelt, 1 Smedes & Marshall, 559.

[6] Cole *v.* Dugger, 41 Mississippi, 557.

[7] Jeffries *v.* Rudloff, 73 Iowa, 60.

[8] Bullitt *v.* Winston, 1 Munford, 269; Dawson *v.* Moons, 4 Ibid. 535; Baird *v.* Rice, 1 Call, 18.

[9] Gay *v.* Caldwell, Hardin, 63.

[10] Mason *v.* Anderson, 3 Monroe, 293; Malone *v.* Samuel, 3 A. K. Marshall, 350.

[11] Irvine *v.* Scobee, 5 Littell, 70.

[12] Johnson *v.* Day, 17 Pick. 106.

defendants, the Supreme Court, after a writ of error was sued out to reverse the judgment, continued the case until an application could be made to the inferior court for leave for the officer to amend his return; intimating that the inferior court had the power to grant the leave.[1] But after the case had gone back to the inferior court, which refused to allow the amendment, the Supreme Court declined to interfere, because the matter was peculiarly within the discretion of the inferior court.[2] In Maryland, where a sheriff erroneously made a return of *cepi corpus*, upon a writ of attachment, he was allowed, six years afterwards, to amend the return.[3] In Alabama, a return may be amended after demurrer.[4] Where an officer made a minute on the writ of the time and mode of service, he was permitted, in Massachusetts, after he went out of office, and after the case had gone into the appellate court, to complete his return from his minutes on the writ.[5] But in Connecticut, where a sheriff attached goods, which were subject to a previous attachment, and the court out of which the process issued allowed him, after he went out of office, to amend his return, by adding to it that he attached the property subject to a prior attachment, it was held by the Supreme Court that the amendment could not be made; not only because no notice to the parties was given of the motion to amend, but because the returning officer was no longer in office.[6]

§ 217. In all cases where application is made for leave to amend a return, there should be something to amend by; though this may not be required by every court to which such applications are addressed. In the case previously referred to in Massachusetts, where the cause was continued by the Supreme Court to give time for an application to the inferior court for leave to amend the return, one of the reasons assigned for not interfering with the refusal of the inferior court to allow the amendment, was, that there was nothing to amend by but the affidavit of the officer. The court said: "At the same term in which a precept is returnable, to correct a mistake or omission may be highly proper; but for an officer to undertake, six years after a defective return, to know with certainty the performance of a particular duty, when he is daily and hourly performing similar duties upon different persons, is more than can be ex-

[1] Thatcher *v.* Miller, 11 Mass. 413.
[2] Thatcher *v.* Miller, 13 Mass. 270.
[3] Hutchins *v.* Brown, 4 Harris & McHenry, 498.
[4] Moreland *v.* Ruffin, Minor, 18.
[5] Adams *v.* Robinson, 1 Pick. 461.
[6] Wilkie *v.* Hall, 15 Conn. 32.

pected of men, however strong their memory. In the cases cited, where amendments have been permitted, there was something on the record by which the correction could be made; and in such cases there can be no difficulty."[1]

§ 218. Where an officer, immediately upon receiving a writ, with directions to attach certain real estate of the debtor, made a memorandum upon the writ that he attached accordingly, stating the day and month, but afterwards, by mistake, returned that he attached on the same day of the succeeding month, he was allowed to correct the error, there being something to amend by.[2] But an amendment was refused, in the date of a return, after a lapse of several years, where the officer made no minute of his doings at the time of the service.[3]

§ 219. In general, no amendment of an officer's return will be permitted, or allowed to have effect, when it would destroy or lessen the rights of third persons, previously acquired, *bona fide*, and without notice by the record, or otherwise. Therefore, where an officer returned on a writ of attachment, that he had attached land of the defendant, on the 6th of *June;* and afterwards, by leave of court, he was permitted to amend his return, by substituting *March* for *June;* it was held, that the amendment was not operative as against a mortgage of the land, recorded in *May*, though the evidence was sufficient to satisfy the court that the attachment was levied in *March*, and that the return, as first made, was a mistake.[4]

§ 220. But if the party who has acquired rights which would be injuriously affected by the amendment, had notice, actual or constructive, that the officer had done his duty, and that there was an omission, by mistake, in his return, which, if supplied, would perfect the officer's proceedings, or if that fact is clearly manifest on the record, he cannot avail himself of the rule above laid down. Thus, A. sued out an attachment against B. on the

[1] Thatcher *v.* Miller, 13 Mass. 270; Emerson *v.* Upton, 9 Pick. 167.

[2] Haven *v.* Snow, 14 Pick. 28; Gay *v.* Caldwell, Hardin, 63; Palmer *v.* Thayer, 23 Conn. 237.

[3] Hovey *v.* Wait, 17 Pick. 196; Fairfield *v.* Paine, 23 Maine, 498.

[4] Emerson *v.* Upton, 9 Pick. 167. See Putnam *v.* Hall, 3 Ibid. 445; Hovey *v.* Wait, 17 Ibid. 196; Williams *v.* Brackett, 8 Mass. 240; Means *v.* Osgood, 7 Maine, 146; Berry *v.* Spear, 13 Ibid. 187; Bannister *v.* Higginson, 15 Ibid. 73; Gilman *v.* Stetson, 16 Ibid. 124; Eveleth *v.* Little, Ibid. 374; Fairfield *v.* Paine, 23 Ibid. 498; Bowman *v.* Stark, 6 New Hamp. 459; Davidson *v.* Cowan, 1 Devereux, 304; Ohio Life Ins. & Tr. Co. *v.* Urbana, Ins. Co., 13 Ohio, 220.

19th of November; on the next day, C. likewise obtained an attachment against B. The same attorney acted for both plaintiffs, having a full knowledge of all the facts, and directing the order of the attachments. The sheriff, in returning A.'s attachment, dated the levy, by mistake, on the 19th of *December*, while he returned C.'s attachment as having been levied on the 20th of *November;* thus giving the second attachment priority. At the return term of the writs, the sheriff obtained leave to amend his return on A.'s writ by inserting *November* instead of *December;* and this amendment was held effective against C., because he had, through his attorney, constructive notice that A.'s attachment was anterior to his.[1] So, where a writ of attachment was issued and levied on land, on the 4th of November, 1833, and was actually returned at the term next ensuing its date, and judgment was rendered at the June Term, 1834, though the sheriff returned that he had executed it on the 4th of November, 1834; it was held, that the sheriff might amend his return according to the fact, and that the amendment should be effective against a grantee of the defendant under a deed dated November 26, 1833, because the record clearly showed the mistake, and no one could by possibility be misled or injured by it?[2]

[1] Haven *v.* Snow, 14 Pick. 28.

[2] Johnson *v.* Day, 17 Pick. 106; Childs *v.* Barrows, 9 Metcalf, 413; Fairfield *v.* Paine, 23 Maine, 498.

CHAPTER VIII.

EFFECT AND OFFICE OF AN ATTACHMENT.

§ 221. In the absence of contrary statute, the mere issue of an attachment has no force as against the defendant's property, either with reference to his rights, or to those of third persons therein;[1] nor has its lodgment in the hands of an officer;[2] but its effect is to be dated from the time of its actual service.[3] And when questions arise as to the title of property claimed through an attachment, and the judgment and execution following it, the rights so acquired look back for their inception, not to the judgment, but to the attachment.[4] Therefore, where land

[1] Mears *v.* Winslow, 1 Smedes & Marshall, Ch'y, 449; Williamson *v.* Bowie, 6 Munford, 176; Wallace *v.* Forest, 2 Harris & McHenry, 261; Tomlinson *v.* Stiles, 4 Dutcher, 201.

[2] Crowninshield *v.* Strobel, 2 Brevard, 80; Robertson *v.* Forrest, Ibid. 466; Bethune *v.* Gibson, Ibid. 501; Crocker *v.* Radcliffe, 3 Ibid. 23; Lynch *v.* Crary, 52 New York, 181.

[3] Gates *v.* Bushnell, 9 Conn. 530; Sewell *v.* Savage, 1 B. Monroe, 260; Nutter *v.* Connett, 3 Ibid. 199; Fitch *v.* Waite, 5 Conn. 117; Learned *v.* Vandenburgh, 8 Howard Pract. 77; Pond *v.* Griffin, 1 Alabama, 678; Crowninshield *v.* Strobel, 2 Brevard, 80; Robertson *v.* Forrest, Ibid. 466; Bethune *v.* Gibson, Ibid. 501; Crocker *v.* Radcliffe, 3 Ibid. 23; Zeigenhagen *v.* Doe, 1 Indiana, 296; Burkhardt *v.* McClellan, 15 Abbott Pract. 243, *note*; Taffts *v.* Manlove, 14 California, 47; Haldeman *v.* Hillsborough & Cin. R. R. Co., 2 Handy, 101; Kuhn *v.* Graves, 9 Iowa, 303; Stockley *v.* Wadman, 1 Houston, 350; Rodgers *v.* Bonner, 45 New York, 379; Lynch *v.* Crary, 52 Ibid. 181; Ensworth *v.* King, 50 Missouri, 477; Hunt *v.* Strew, 39 Michigan, 368; McCobb *v.* Tyler, 2 Cranch C. C., 199; Grigsley *v.* Love, Ibid. 413; Crisman *v.* Dorsey, 12 Colorado, 567; May *v.* Buckhannon R. L. Co., 70 Maryland, 448; McIntosh *v.* Smiley, 32 Missouri Appeal, 125.

[4] Tyrell *v.* Rountree, 7 Peters, 464; 1 McLean, 95; Stephen *v.* Thayer, 2 Bay, 272; Am. Ex. Bank *v.* Morris Canal & Banking Co., 6 Hill (N. Y.), 362; Martin *v.* Dryden, 6 Illinois (1 Gilman), 187; Redus *v.* Wofford, 4 Smedes & Marshall, 579; Stanley *v.* Perley, 5 Maine, 369; Emerson *v.* Littlefield, 12 Ibid. 148; Brown *v.* Williams, 31 Ibid. 403; Coffin *v.* Ray, 1 Metcalf, 212; Tappan *v.* Harrison, 2 Humphreys, 172; Oldham *v.* Scrivener, 3 B. Monroe, 579; Lackey *v.* Seibert, 23 Missouri, 85; Ensworth *v.* King, 50 Ibid. 477; Hall *v.* Stephens, 65 Ibid. 670; Hannahs *v.* Felt, 15 Iowa, 141; Cockey *v.* Milne's Lessee, 16 Maryland, 200; Wilson *v.* Forsyth, 24 Barbour, 105; Bagley *v.* Ward, 37 California, 121; Porter *v.* Pico, 55 Ibid. 165; Wright *v.* Smith, 11 Nebraska, 341; Loubat *v.* Kipp, 9 Florida, 60; Striplin *v.* Cooper, 80 Alabama, 256; Richardson *v.* Adler, 46 Arkansas, 43; Brown *v.* Tucker, 7 Colorado, 30.

was attached on different days, under two writs in favor of different parties, and was sold under the execution of the junior attacher, such sale had no effect to discharge the lien of the senior attachment.[1]

§ 222. The levy of an attachment is no satisfaction of the plaintiff's demand, as that of an execution is, under some circumstances;[2] nor does it change the estate of the defendant in the property attached;[3] though, to the extent of its lien, his absolute property is diminished.[4] Nor does it take away his power of transfer, either absolutely or in mortgage, subject to the lien of the attachment.[5] Nor does the attaching plaintiff acquire any property thereby.[6] Nor can he sell the property by virtue of the attachment, before judgment and execution; but can do so only under an order of court, or of the judge who issued the writ.[7] Nor has the court authority to order the attached property to be delivered to the plaintiff.[8] Therefore, where an attaching creditor, after obtaining judgment in the action, demanded the attached goods of the officer, who refused to deliver them, and the creditor thereupon sued him; it was decided, that it was not the duty of the officer, but would have been contrary to his duty, to make such a delivery; that the goods were in the legal custody of the officer, who was accountable for them; and

[1] Hanauer *v.* Casey, 26 Arkansas, 352.

[2] McBride *v.* Farmers' Bank, 28 Barbour, 476; Maxwell *v.* Stewart, 22 Wallace, 77; Cravens *v.* Wilson, 48 Texas, 324. *Sed contra*, Yourt *v.* Hopkins, 24 Illinois, 326.

[3] Bigelow *v.* Willson, 1 Pick. 485; Blake *v.* Shaw, 7 Mass. 505; Starr *v.* Moore, 3 McLean, 354; Tiernan *v.* Murrah, 1 Robinson (La.), 443; Crocker *v.* Pierce, 31 Maine, 177; Wheeler *v.* Nichols, 32 Ibid. 233; Perkins *v.* Norvell, 6 Humphreys, 151; Snell *v.* Allen, 1 Swan, 208; Oldham *v.* Scrivener, 3 B. Monroe, 579; Haldeman *v.* Hillsborough, & Cin. R. R. Co., 2 Handy, 101; Merrick *v.* Hutt, 15 Arkansas, 331; Atkins *v.* Swope, 38 Ibid. 528; Larimer *v.* Kelly, 10 Kansas, 298; Scarborough *v.* Malone, 67 Alabama, 570.

[4] Grosvenor *v.* Gold, 9 Mass. 209; Smith *v.* Clinton Bridge Co., 13 Bradwell, 572.

[5] Bigelow *v.* Willson, 1 Pick. 485; Denny *v.* Willard, 11 Ibid. 519; Fettyplace *v.* Dutch, 13 Ibid. 388; Arnold *v.* Brown, 24 Ibid. 89; Richardson *v.* Reed, 4 Gray, 441; Dobbins *v.* Hanchett, 20 Illinois Appellate, 396; Warner *v.* Everett, 7 B. Monroe, 262; Wheeler *v.* Nichols, 32 Maine, 233; Calkins *v.* Lockwood, 17 Conn. 154; Merrick *v.* Hutt, 15 Arkansas, 331; Klinck *v.* Kelly, 63 Barbour, 622; Ware *v.* Russell, 70 Alabama, 174; Smith *v.* Clinton Bridge Co., 13 Bradwell, 572.

[6] Bigelow *v.* Willson, 1 Pick. 485; Crocker *v.* Radcliffe, 3 Brevard, 23; Willing *v.* Bleeker, 2 Sergeant & Rawle, 221; Owings *v.* Norwood, 2 Harris & Johnson, 96; Goddard *v.* Perkins, 9 New Hamp. 488; Austin *v.* Wade, Pennington, 2d Ed. 727; Foulks *v.* Pegg, 6 Nevada, 136; Atkins *v.* Swope, 38 Arkansas, 528.

[7] McKay *v.* Harrower, 27 Barbour, 463; Culver *v.* Rumsey, 6 Bradwell, 598.

[8] Welch *v.* Jamison, 1 Howard (Mi.), 160.

that the general property in them was not changed until a levy and sale by execution.[1]

§ 223. It is a well-settled principle, that an attaching creditor can acquire through his attachment no higher or better rights to the property or assets attached, than the defendant had *when the attachment took place*, unless he can show some fraud or collusion by which his rights are impaired.[2] No interest subsequently acquired by the defendant in the attached property will be affected by the attachment.[3] If the property, when attached, is subject to a lien *bona fide* placed upon it by the defendant, that lien must be respected, and the attachment postponed to it.[4] And this rule was once held to extend to at least one description of what have been termed *silent* liens, that is, liens existing merely by operation of law. Under this view it was held by the Circuit Court of the United States for Pennsylvania, that the sale of a ship under attachment had no effect to devest a lien in admiralty for mariners' wages.[5] But subsequently, by the Supreme Court of Pennsylvania, and by that of the United States, it was decided that an attachment issued by a State court and levied upon a vessel, was not defeated by a subsequent proceeding *in rem* in admiralty for such wages.[6]

§ 224. When an attachment is served, a lien on the property attached is created, which nothing subsequent can destroy but the dissolution of the attachment.[7] It is said to be beyond the

[1] Blake *v.* Shaw, 7 Mass. 505.

[2] *Post*, § 245; Alexander *v.* Pollock, 72 Alabama, 137.

[3] Crocker *v.* Pierce, 31 Maine, 177; Handly *v.* Pfister, 39 California, 283.

[4] Nathan *v.* Giles, 5 Taunton, 558, 576; Baillio *v.* Poisset, 8 Martin, N. S. 337; Frazier *v.* Willcox, 4 Robinson (La.), 517; Peck *v.* Webber, 7 Howard (Mi.), 658; Parker *v.* Farr, 2 Browne, 331; Reeves *v.* Johnson, 7 Halsted, 29; Meeker *v.* Wilson, 1 Gallison, 419; Haldeman *v.* Hillsborough & Cin. R. R. Co., 2 Handy, 101.

[5] Taylor *v.* Royal Saxon, 1 Wallace, Jr., 311.

[6] Taylor *v.* Carryl, 24 Penn. State, 259; S. C. 20 Howard Sup. Ct. 583.

[7] Goore *v.* McDaniel, 1 McCord, 480; Peck *v.* Webber, 7 Howard (Mi.), 658; Smith *v.* Bradstreet 16 Pick. 264; People *v.* Cameron, 7 Illinois (2 Gilman), 468; Vinson *v.* Huddleston, Cooke, 254; Van Loan *v.* Kline, 10 Johnson, 129; Desha *v.* Baker, 8 Arkansas, 509; Frellson *v.* Green, 19 Ibid. 376; Harrison *v.* Trader, 29 Ibid. 85; Richardson *v.* Adler, 46 Ibid. 43; Davenport *v.* Lacon, 17 Conn. 278; Woolfolk *v.* Ingram, 53 Alabama, 11; McClellan *v.* Lipscomb, 56 Ibid. 255; Grigg *v.* Banks, 59 Ibid. 311; Schacklett & Glyde's Appeal, 14 Penn. State, 326; Erskine *v.* Staley, 12 Leigh, 406; Moore *v.* Holt, 10 Grattan, 284; Cary *v.* Gregg, 3 Stewart, 433; Murray *v.* Gibson, 2 Louisiana Annual, 311; Hervey *v.* Champion, 11 Humphreys, 569; Snell *v.* Allen, 1 Swan, 208; Zeigenhagen *v.* Doe, 1 Indiana, 296; Pierson *v.* Robb, 4 Illinois (3 Scammon), 139; Martin *v.* Dryden, 6 Illinois (1 Gilman), 187; Lyon *v.* Sanford, 5 Conn. 544; Lackey *v.* Seibert, 23 Mis-

power of a State legislature to pass an act annulling it.[1] And as to the defendant, though, as we have just seen, his power of alienation, subject to the attachment, is not impaired, yet no subsequent act of that description on his part can defeat the attachment.[2]

§ 224 *a*. The power to levy by virtue of an attachment does not survive the recovery of judgment in the action, and no new right or interest in the property of the defendant can be thereafter acquired under it.[3] And when, in a suit by attachment the plaintiff obtains a judgment which, by the existing law, is a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is to preserve the priority thereby acquired, and this priority is maintained and enforced under the judgment. If the plaintiff neglect, within the lawful period of his judgment lien, to subject the property to execution, the lien of the attachment does not revive on the expiration of the judgment lien.[4]

§ 225. In connection with the lien acquired by an attaching creditor has come up, in different forms, the question of his right to secure the benefit of his lien, as against fraudulent conveyances of, and incumbrances upon, the attached property. The first shape this question assumed was, as to the attaching creditor's right to maintain a creditor's bill in equity to set aside such a conveyance or incumbrance. The general rule that a creditor at large, before he obtains judgment, is not entitled to such a remedy, is familiar to the legal mind. That, like all general rules, it is subject to exceptions, was held by the Court of Appeals of Kentucky, in sustaining such a bill by a creditor at large, where the debtor resided or had removed out of the State, so as to prevent a judgment being obtained against him at

souri, 85; Hannahs *v.* Felt, 15 Iowa, 141; Chandler *v.* Dyer, 37 Vermont, 345; Ward *v.* McKenzie, 33 Texas, 297; Emery *v.* Yount, 7 Colorado, 107.

[1] Hannahs *v.* Felt, 15 Iowa, 141. But if the legislature repeal the law authorizing proceedings by attachment, it was held in Indiana, there can be no further movement in pending suits of that kind. See *post*, § 412.

[2] McBride *v* Floyd, 2 Bailey, 209; Harvey *v.* Grymes, 8 Martin, 95; Bach *v.* Goodrich, 9 Robinson (La.), 391; Franklin Fire Ins. Co. *v.* West, 8 Watts & Sergeant, 350; Randolph *v.* Carlton, 8 Alabama, 606; Conway *v.* Butcher, 8 Philadelphia, 272; Ozmore *v.* Hood, 53 Georgia, 114; Stevenson *v.* Prather, 24 Louisiana Annual, 434.

[3] Lynch *v.* Crary, 52 New York, 181.

[4] Bagley *v.* Ward, 37 California, 121; Speelman *v.* Chaffee, 5 Colorado, 247; Juilliard *v.* May, 130 Illinois, 87.

law.[1] And so in Missouri, where the debtor had absconded, and under the particular circumstances of that case, the law afforded no remedy by attachment.[2] In several States the attempt has been made to establish an exception in favor of attaching creditors. In New York, before the adoption of the Code of Procedure, and when an attachment operated in favor of all the creditors of the defendant who should present their claims, a bill in favor of an attaching creditor was sustained by the Court of Chancery;[3] but in other cases, since the adoption of the Code, as will presently appear, the contrary has been held. In Illinois the question arose where no property was seized, but only a garnishee summoned; and the court held, that the garnishment was not a lien on the effects in the garnishee's hands, and therefore would not sustain the bill. The decision, however, did not rest on that position alone, but the court applied the general rule, as above stated; which would have been equally adverse to the proceeding if property had been levied on.[4] In Missouri, the rule was applied, where attachments were levied on goods previously taken under executions issued on judgments confessed by the defendants, which were alleged to be fraudulent.[5] In Nebraska, it was enforced, where an attachment was levied on real estate, and the attachment plaintiff sought to set aside a conveyance of the land, alleged to be fraudulent.[6] And so in Kansas, where personal property was attached.[7] On the other hand, it has been held in New Hampshire,[8] New Jersey,[9] Texas,[10] and California,[11] that an attachment confers a lien, in virtue of which the bill may be maintained; but, in the last-named State, that the lien of the attachment could not be rendered effectual for the purpose of impeaching a conveyance alleged to be fraudulent, until judgment should have been obtained in the attachment suit.[12] Such is the state of the decisions in regard to the specific recourse through a creditor's bill.

[1] Scott *v.* McMillen, 1 Littell, 302.

[2] Pendleton *v.* Perkins, 49 Missouri, 565.

[3] Falconer *v.* Freeman, 4 Sandford, Ch'y, 565.

[4] Bigelow *v.* Andress, 31 Illinois, 322.

[5] Martin *v.* Michael, 23 Missouri, 50.

[6] Weil *v.* Lankins, 3 Nebraska, 384.

[7] Tennent *v.* Battey, 18 Kansas, 324.

[8] Stone *v.* Anderson, 6 Foster, 506; Dodge *v.* Griswold, 8 New Hamp. 425; Tappan *v.* Evans, 11 Ibid. 311; Sheafe *v.* Sheafe, 40 Ibid. 516.

[9] Hunt *v.* Field, 1 Stockton, 36, overruling Melville *v.* Brown, 1 Harrison, 363. See Williams *v.* Michenor, 3 Stockton, 520; Robert *v.* Hodges, 16 New Jersey, Eq., 299; Curry *v.* Glass, 25 Ibid. 108; Smith *v.* Muirheid, 34 Ibid. 4; Cocks *v.* Varney, 45 Ibid. 72.

[10] Ward *v.* McKenzie, 33 Texas, 297.

[11] Heyneman *v.* Dannenberg, 6 California, 376, Scales *v.* Scott, 13 Ibid. 76. See Castle *v.* Bader, 23 Ibid. 75.

[12] McMinn *v.* Whelan, 27 California, 300.

But the matter has, substantially, come up in another shape, with other results. Attachments are often levied upon goods found in the possession of a third party, claiming title to them under a sale or assignment from the defendant, which the attaching creditor, or the officer, or both believe to be fraudulent and void as against creditors. If, in such a case, the creditor may not, in virtue of his attachment, maintain a bill to set aside the sale or assignment, must the attachment therefore be fruitless? This question has been directly presented in connection with actions by the vendee or assignee against the officer or the attaching creditor, either for trespass, or for the goods, or for the value thereof. Against the right of the officer or creditor when so sued, to set up the fraudulent character of the sale or assignment as a defence, the same ground is taken as against the right of a creditor to maintain a creditor's bill, namely, that the creditor is only a creditor at large until he has obtained a judgment. On the other hand, it is urged that the statute relative to fraudulent conveyances is not by its terms confined to judgment creditors; that such conveyances are void as to all creditors who elect to treat them as void by adopting the process which the law provides; that attachment, as a provisional remedy, is one of these, the command of which is the same, in substance, as that of an execution; and that a levy under it is a lien, which authorizes the party claiming through it to assail, as fraudulent, transfers of the property levied on.

On the question, as thus presented, it was, by the Supreme Court of New York, once held that an attaching creditor, with no judgment or execution, had no standing in court which would enable him, when sued for the value of attached goods by an alleged vendee thereof, to impeach and litigate the *bona fides* of a sale of the goods, which had been consummated by transfer and delivery before the attachment was levied.[1] And this ruling was followed in a case where an attachment was levied on goods previously seized under execution issued upon a judgment confessed by the defendant, which the attaching plaintiff alleged to be fraudulent.[2] But the ruling in the first case was expressly, and in the second case substantially, overruled by the Court of Appeals of that State.[3] And in a subsequent case, where a sheriff was sued by one claiming attached property under an assignment from the defendant, which the sheriff al-

[1] Hall v. Stryker, 29 Barbour, 105; 9 Abbott Pract. 342.

[2] Bentley v. Goodwin, 15 Abbott Pract. 82; Brooks v. Stone, 19 Howard Pract. 395.

[3] Hall v. Stryker, 27 New York, 596.

leged to be fraudulent, as against the defendant's creditors, that court held, that an attachment in the hands of an officer authorized him to seize any property which the defendant had disposed of in any manner with intent to defraud his creditors; that the attaching creditor was not, after service of his attachment, to be deemed a mere creditor at large, but a creditor having a specific lien upon the goods attached; and that the sheriff, as his bailee, had a like lien, and had the right to show that the assignee's title was fraudulent as against attaching creditors;[1] and that an attaching creditor might maintain an action to have a prior assignment executed by the debtor and an execution issued upon judgment confessed by him declared fraudulent and void, and to have the priority of the lien acquired by him under the attachment established.[2] And this right does not depend on the recovery of judgment in the attachment suit, but exists anterior to such recovery.[3] The position taken by the New York Court of Appeals is substantially held in New Hampshire,[4] Connecticut,[5] Michigan,[6] Indiana,[7] Kentucky,[8] and Oregon.[9]

In view of these New York decisions, it would seem that the position taken by CLERKE, J., of the Supreme Court of that State, was justifiable, when he said: "Since the decision in Rinchey *v.* Stryker, I consider it no longer an open question, whether, when an attachment is issued under the Code of Procedure, the plaintiff in the action obtains such a lien on the property attached as will entitle him to the intervention of the equitable jurisdiction of the court to remove or set aside all fraudulent claims and transfers, or any other fraudulent obstacles in the way of the realization of the lien, in case the plaintiff should recover a judgment."[10] But such was not the view of the Court of Appeals, by which it is still held, that an attaching plaintiff

[1] Rinchey *v.* Stryker, 28 New York, 45; 26 Howard Pract. 75. See Frost *v.* Mott, 34 New York, 253; Jacobs *v.* Remsen, 12 Abbott Pract. 390; Schlussell *v.* Willet, Ibid. 397; Thayer *v.* Willet, 5 Bosworth, 344; 9 Abbott Pract. 325; Kelly *v.* Lane, 28 Howard Pract. 128; 42 Barbour, 594; 18 Abbott Pract. 229; Mechanics' & Traders' Bank *v.* Dakin, 33 Howard Pract. 316; Bates *v.* Plonsky, 62 Ibid. 429; Carr *v.* Van Hoesen, 33 New York Supreme Ct. 316.

[2] Bates *v.* Plonsky, 35 New York Supreme Ct. 112.

[3] Rinchey *v.* Stryker, 28 New York, 45; 26 Howard Pract. 75; Thurber *v.* Blanck, 50 New York, 80; Kelly *v.* Lane, 28 Howard Pract. 128; 42 Barbour, 594; 18 Abbott Pract. 229.

[4] Angier *v.* Ash, 6 Foster, 99.

[5] Owen *v.* Dixon, 17 Conn. 492; Peck *v.* Whiting, 21 Ibid. 206; Potter *v.* Mather, 24 Ibid. 551.

[6] Dixon *v.* Hill, 5 Michigan, 404.

[7] Quarl *v.* Abbott, 102 Indiana, 233.

[8] Martz *v.* Pfeifer, 80 Kentucky, 600; Little *v.* Ragan, 83 Ibid. 321.

[9] Dawson *v.* Sims, 14 Oregon, 561.

[10] Greenleaf *v.* Mumford, 30 Howard Pract. 30; 19 Abbott Pract. 469; 42 Barbour, 594.

cannot, on the ground of his attachment, maintain a creditor's bill.[1]

In connection with the justification by an officer or creditor of an attachment of goods in the hands of a third person, whose possession and title are alleged by the former to be fraudulent, it is important to note, that the officer or creditor must not rely merely on the production of the attachment, but must go further, and prove the defendant's indebtedness, and also that the attachment was regularly issued. A failure to prove either of these matters will be fatal to the defence.[2]

§ 225 *a*. In any court allowing an attaching plaintiff to maintain a creditor's bill, it would doubtless be held, as it was in New Jersey, that, in the suit for that purpose before he has obtained judgment, the plaintiff must show that he is a creditor, and that he has acquired a lien through his attachment; and the defendant is at liberty to contest the whole ground on which the plaintiff's action stands, and to interpose any defence which would show that the plaintiff is not a creditor, and that he has no lien.[3]

§ 226. The lien of an attachment extends only to the property which has been actually subjected to its action. It cannot constructively reach the property of one who has been summoned as garnishee. Therefore, where one who had been so summoned died, pending the proceedings against him, and his administrator was made a party to the suit as his representative, and judgment was rendered against the administrator, on account of a debt due from the intestate to the attachment defendant; it was held, that this judgment was not entitled to priority over any other debts of the intestate, as the attachment was no lien upon his effects, and the plaintiff could acquire no greater interest under the attachment proceedings, in the debt of the garnishee to the defendant, than the defendant himself would have had if no attachment had been made.[4]

§ 227. The lien of an attachment is not limited to the amount for which the writ commands the officer to attach; but is com-

[1] Lawrence *v.* Bank, 35 New York, 320; Thurber *v.* Blanck, 50 Ibid. 80. See Reubens *v.* Joel, 3 Kernan, 488; Mills *v.* Block, 30 Barbour, 549.

[2] Noble *v.* Holmes, 5 Hill (N. Y.), 194; Van Etten *v.* Hurst, 6 Ibid. 311; Thornburgh *v.* Hand, 7 California, 554.

[3] Cocks *v.* Varney, 45 New Jersey Eq. 72.

[4] Parker *v.* Farr, 2 Browne, 331; Parker *v.* Parker, 2 Hill Ch'y, 35.

mensurate with the amount of the judgment and costs, though that be greater than the sum which the precept of the writ required the officer to secure.[1] But this is not to be understood as authorizing a judgment in the attachment suit for any other cause of action than that for which the attachment was issued. If the plaintiff take judgment for more than was then due him, with interest, he cannot, as against other attaching creditors, sustain his attachment for the excess. Thus, where a debt was payable by instalments, one falling due in May, and one in September; and in the intervening July an attachment was sued out on that which matured in May; and in the following December the plaintiff took judgment for *both* instalments; it was held, that, as against a junior attacher, he could hold only the amount of the May instalment, with interest.[2]

§ 227 *a*. The judgment which the attached property must answer is that which the plaintiff may ultimately recover, and not merely that which he may in the first instance obtain. Hence, if the judgment in the court in which the attachment suit was instituted be for only a part of the plaintiff's claim, and he appeal therefrom, the defendant is not entitled, pending the appeal, to have the attachment discharged on payment of the part awarded him.[3]

§ 228. As the whole office of an attachment is to seize and hold property until it can be subjected to execution, its lien is barren of any beneficial results to the plaintiff, unless he obtain judgment against the defendant, and proceed to subject the property to execution. A judgment for the defendant, therefore, destroys the lien, and remits the parties to their respective positions before the attachment was levied.[4]

§ 229. An attachment takes precedence of a junior execu-

[1] Searle *v.* Preston, 33 Maine, 214.

[2] Syracuse City Bank *v.* Coville, 19 Howard Pract. 385. The question does not appear to have been raised, whether the taking of the judgment for more than was sued for did not wholly dissolve the attachment as to subsequent attachers. Had it been, the court would hardly have hesitated to sustain it, as was done in a similar case in Michigan. Hale *v.* Chandler, 3 Michigan, 531. Such a ruling would have been fully upheld by the cases cited, *post*, § 282. And see Tunnison *v.* Field, 21 Illinois, 108; Austin *v.* Burgett, 10 Iowa, 302.

[3] Wright *v.* Rowland, 4 Abbott Ct. of Appeals, 649.

[4] Clapp *v.* Bell, 4 Mass. 99; Johnson *v.* Edson, 2 Aikens, 299; Suydam *v.* Huggeford, 23 Pick. 465; Hale *v.* Cummings, 3 Alabama, 398; Lamb *v.* Belden, 16 Arkansas, 539; O'Connor *v.* Blake, 29 California, 312; Loveland *v.* Alvord C. Q. M. Co., 76 Ibid. 562; Dean *v.* Stephenson, 61 Mississippi, 175.

tion;[1] and a purchaser of land under an attachment will prevail against a purchaser under a judgment obtained after the levy of the attachment, though the judgment in the attachment suit was subsequent to the other.[2] The strength of this doctrine was illustrated in a case in Pennsylvania, under a statute which declared that "every writ of attachment executed on real estate shall bind the same *against purchasers and mortgagees.*" On the 18th of January, 1847, an attachment was executed on real estate. In November, 1848, judgment was obtained in the action. In the mean time, several other creditors of the defendant sued out attachments, and caused them to be executed on the same real estate; and in all those cases the defendant confessed judgments in April, May, and June, 1848. The plaintiffs in these judgments claimed priority of the first attaching creditor, because, though their attachments were later than his, their judgments were earlier; and it was contended, on their behalf, that the lien of the first attachment bound the property only as against subsequent *purchasers and mortgagees;* but it was held, that though a judgment creditor was neither a purchaser nor a mortgagee, and therefore not within the letter of the law, yet he was within its equity; and the priority of the first attachment was sustained.[3] And so, where mortgages of personalty are, by law, declared inoperative against creditors and purchasers without notice, until recorded, the levy of an attachment confers a claim superior to that of an unrecorded mortgage.[4]

§ 230. An attachment in the hands of one officer, levied on personal property, will take precedence of a senior execution, in the hands of another officer, who has not effected a levy.[5] Thus, where a constable seized certain property, under an attachment for a sum exceeding fifty dollars, issued by a justice of the peace, and the law required that, in such a case, he should deliver the property to the sheriff, to be sold, if required to satisfy the attachment, which was done, and the sheriff, instead of

[1] Goore *v.* McDaniel, 1 McCord, 480; Van Loan *v.* Kline, 10 Johnson, 129; Lummis *v.* Boon, 2 Pennington, 734; Pond *v.* Griffin, 1 Alabama, 678; Beck *v.* Brady, 7 Louisiana Annual, 1; Harbison *v.* McCartney, 1 Grant, 172; Stockley *v.* Wadman, 1 Houston, 350; Husbands *v.* Jones, 9 Bush, 218; Brown *v.* Tucker, 7 Colorado, 30; Eddy *v.* Weaver, 37 Kansas, 540.

[2] Redus *v.* Wofford, 4 Smedes & Marshall, 579; American Ex. Bank *v.* Morris C. & B. Co., 6 Hill (N. Y.), 362; Martin *v.* Dryden, 6 Illinois (1 Gilman), 187; Baldwin *v.* Leftwich, 12 Alabama, 838; Tappan *v.* Harrison, 2 Humphreys, 172; Oldham *v.* Scrivener, 3 B. Monroe, 579.

[3] Schacklett & Glyde's Appeal, 14 Penn. State, 326.

[4] Hardaway *v.* Semmes, 38 Alabama, 657.

[5] Field *v.* Milburn, 9 Missouri, 492.

holding the property subject to the attachment, levied on it an execution that was in his hands before the attachment was levied; this was held a wrongful act, which would enable the constable to maintain replevin against the sheriff for the property.[1]

§ 231. Unless otherwise directed by statute, attachments take precedence, and are entitled to satisfaction, in the order, in point of time, of their service;[2] and if the proceeds of the attached property be more than sufficient to satisfy the execution of the first attacher, the surplus is applicable to the claims of the subsequent attachments.[3] This rule of precedence applies in a case between a sheriff and his deputy, each holding an attachment against the same defendant. In such case if the deputy make the first service, his writ will hold the property against any subsequent service by the sheriff of an older writ.[4]

[1] Bourne *v.* Hocker, 11 B. Monroe, 23.

[2] Robertson *v.* Forrest, 2 Brevard, 466; Crowninshield *v.* Strobel, Ibid. 80; Emerson *v.* Fox, 3 Louisiana, 183; Atlas Bank *v.* Nahant Bank, 23 Pick. 488; Wallace *v.* Forrest, 2 Harris & McHenry, 261; Talbot *v.* Harding, 10 Missouri, 850; Farmers' Bank *v.* Day, 6 Grattan, 360; Greenleaf *v.* Mumford, 30 Howard Pract. 30; 19 Abbott Pract. 469.

[3] Wehle *v.* Butler, 35 New York Superior Court, 215.

[4] Meacham Arms Co. *v.* Strong, 3 Washington C. C. 61; Albrecht *v.* Long, 27 Minnesota, 81; Russell *v.* Lawton, 14 Wisconsin, 202.

CHAPTER IX.

ATTACHMENT OF REAL ESTATE.

§ 232. It would be inconsistent with the scope and design of this work to set forth the law of each State as to the interests in real estate which are subject to attachment. It may be stated, however, that the general principle which confines the right of attachment of tangible property to such interests therein, or descriptions thereof, as can be sold, or otherwise made available under execution, to satisfy the plaintiff's demand, applies as well to real as personal property.

§ 233. Whether real estate can be attached, when the defendant has sufficient personal property, accessible to the officer, out of which to make the debt, must, in like manner, depend on the statutes of each State, and the terms of the writ under which the officer acts. It may be considered a sound doctrine, that, in the absence of any positive limitation of the right of attachment, real estate may be as well attached as personalty; and that the existence within the knowledge of the officer of a sufficiency of the latter, which he might seize, will not invalidate an attachment of the former. This was so held, where the statute directed attachments to be served by attaching the goods or chattels of the defendant, or if none could be found, by attaching his person or land.[1]

§ 234. Another established principle affects with peculiar fitness attachments of real estate, — that the attachment can operate only upon the right of the defendant existing *when it is made*. If, prior to the attachment, he had sold and conveyed the land, in good faith, but the vendee did not put the deed on record until afterward, but did so before a sale of the land under execution, it cannot be held for the debt of the vendor.[2] Nor,

[1] Isham *v.* Downer, 8 Conn. 282; Weathers *v.* Mudd, 12 B. Monroe, 112.

[2] Cox *v.* Milner, 23 Illinois, 476; Savery *v.* Browning, 18 Iowa, 246; Reed *v.* Ownby, 44 Missouri, 204; Sappington *v.* Oeschli, 49 Ibid. 244; Plant *v.* Smythe,

on the other hand, can any interest which the defendant subsequently acquires be reached by it.[1]

§ 235. The question has frequently arisen, whether a mortgagee of real estate has an attachable interest therein. It has been held in several States, that before an entry for condition broken, with a view to foreclosure, such interest cannot be taken in satisfaction of a judgment and execution against him. This doctrine has been so frequently discussed, and reaffirmed, that it may be considered fully established. Whether his interest is so changed by such entry, that it becomes attachable, is a question which does not appear to have been distinctly presented for adjudication, except in Maine. In several opinions, courts had carefully limited the doctrine to the cases before them, where there had been no entry for a breach of the condition, or where the mortgagor was in possession; and in others, they intimated, in terms far from implying doubts, that the respective rights of the parties to a mortgage were not materially changed by the entry of the mortgagee. Before the Supreme Court of Maine, however, the question was broadly presented, and after a full and careful examination, it was decided that the interest of a mortgagee cannot be attached any more after entry than before.[2]

§ 236. The requisites of an attachment of real estate are generally determined by statute. Where, however, that is not the case, the rule which has obtained in Maine, Massachusetts, New York, and Texas would probably be received and applied, — that it is not necessary for the officer to go upon the land, or into its vicinity, or to see it, or do any other act than make return upon the writ that he has attached it.[3] He has no right to take actual exclusive possession of the property, or in any way to disturb the possession of the occupants.[4]

§ 236 *a*. The officer's return upon the writ is the only evidence of a valid attachment of real estate. He must make such

45 California, 161; Morrow *v.* Graves, 77 Ibid. 218; Harral *v.* Gray, 10 Neb. 186; United States *v.* Howgate, 2 Mackey, 408; Holden *v.* Garrett, 23 Kansas, 98; Northwestern F. Co. *v.* Mahaffey, 36 Ibid. 152.

[1] Crocker *v.* Pierce, 31 Maine, 177.

[2] Smith *v.* People's Bank, 24 Maine, 185; Lincoln *v.* White, 30 Ibid. 291; Thornton *v.* Wood, 42 Ibid. 282. See Courtney *v.* Carr, 6 Iowa, 238.

[3] Crosby *v.* Allyn, 5 Maine, 453; Perrin *v.* Leverett, 13 Mass. 128; Taylor *v.* Mixter, 11 Pick. 341; Burkhardt *v.* McClellan, 15 Abbott Pract. 243, *note;* 1 Abbott Ct. of Appeals, 263; Rodgers *v.* Bonner, 55 Barbour, 9; Hancock *v.* Henderson, 45 Texas, 479; Sanger *v.* Trammell, 66 Ibid. 361; Riordan *v.* Britton, 69 Ibid. 198.

[4] Wood *v.* Weir, 5 B. Monroe, 544.

a return as, under the governing statute, will create a lien. He must not only comply, in fact, with the statute, but his return must show that he has so complied. A return which does not show a compliance with the essential requirements of the statute, creates no lien, as against third persons. Thus, under a statute requiring an officer who has levied an attachment on real estate to file within five days thereafter, in the office of the register of deeds, in the county in which the land is situated, an attested copy of his return of attachment, together with the names of the parties, the sums sued for, the date of the writ, and the court to which it is returnable; it was held, that a return of an attachment which did not show that an attested copy was filed as required by the statute, created no lien on the land; and that the return could not be amended so as to affect the title of an intervening purchaser, unless there was sufficient appearing by the unamended return to give third parties notice that all the requirements of law had probably been complied with.[1]

§ 237. In making such return, a distinction is taken between the levy of an attachment, which is a mere lien on the property, and the levy of an execution, by which, when carried to a sale, the defendant's property is devested. In the latter case greater precision is required than in the former. Hence it has been considered, in the case of an attachment, that any words which clearly designate and comprehend the property attached, are sufficient.[2] In such case, too, the generality of the description makes no difference, if it be sufficiently intelligible to fix the lien of the process. *Id certum est quod certum reddi potest*, and therefore, if the land be at all intelligibly indicated, the application of this principle will remove objections that might exist on the score of imperfection in the description.[3] It has, therefore, been held, that a return of an attachment of the defendant's interest in the farm he lives on is sufficient.[4] So, an attachment of all the defendant's interest in "a certain parcel of land situate on Pleasant Street in Boston," will suffice, if the defendant was interested in only one parcel on that street.[5] And where an officer returned that he had "attached the homestead farm of

[1] Berry v. Spear, 13 Maine, 187; Fairfield v. Paine, 23 Ibid. 498; Carleton v. Ryerson, 59 Maine, 438; Milliken v. Bailey, 61 Ibid. 316; Bessey v. Vose, 73 Ibid. 217; Robertson v. Hoge, 83 Virginia, 124.

[2] Taylor v. Mixter, 11 Pick. 341; White v. O'Bannon, 86 Kentucky, 93.

[3] Crosby v. Allyn, 5 Maine, 453.

[4] Howard v. Daniels, 2 New Hamp. 137; Taylor v. Mixter, 11 Pick. 341.

[5] Whitaker v. Sumner, 9 Pick. 308. See Lambard v. Pike, 33 Maine, 141.

the defendant, containing about thirty acres, more or less;" this was held a sufficient description of the farm, although in fact it contained about 150 acres; the statement of the number of acres being rejected as a mistake in the officer, or as repugnant to the more general description.[1] In Massachusetts[2] it was held that an attachment of "all the defendant's interest in any real estate in the county of W." was sufficient; and so, in that State[3] and New Hampshire,[4] of an attachment of the defendant's "right and interest in any lands in the town of E." But in Maine, such a return is considered void for uncertainty.[5] And so, of an attachment of a defendant's "life-estate in all the lands got by his wife, supposed to be 450 acres."[6] And so, of an attachment of "one half of lot 60," without designating which half.[7] And so, of an attachment of "lot No. 5 in block No. 12."[8]

In Missouri, an attachment was levied on the undivided interest of the defendant in "the south half of the south-east quarter of section 17, T. 57, R. 35, containing eighty acres." This property had, prior to the attachment, been subdivided by the owners into blocks and lots, with streets dedicated to public use separating the blocks, and some of the lots had been sold to third persons, and were occupied by them. Judgment and execution were obtaind in the attachment suit, and the sheriff proceeded to sell a number of the lots laid out in the property described in the levy of the attachment. The purchasers claimed that they had acquired the defendant's undivided interest in these lots; but it was held that the original levy was void for uncertainty, and that it should have described the property levied on with as much certainty as a sheriff's deed.[9]

§ 238. Is it necessary to the validity of an attachment of real estate, with reference to the title acquired through the attachment proceedings, that the return should state the property to be the defendant's? In the light of the authorities cited in a previous chapter,[10] it would seem that this question should be answered in the negative.

§ 239. The effect of an attachment of real estate is to give the plaintiff a lien upon the property from the date of the service of

[1] Bacon v. Leonard, 4 Pick. 277.
[2] Pratt v. Wheeler, 6 Gray, 520.
[3] Taylor v. Mixter, 11 Pick. 341.
[4] Moore v. Kidder, 55 New Hamp. 488.
[5] Hathaway v. Larrabee, 27 Maine, 449.
[6] Fitzhugh v. Hellen, 3 Harris & Johnson, 206.
[7] Porter v. Byrne, 10 Indiana, 146.
[8] Meuley v. Zeigler, 23 Texas, 88.
[9] Henry v. Mitchell, 32 Missouri, 512.
[10] *Ante*, § 207.

the writ. By the act of attaching, no estate passes to the plaintiff,[1] or to the attaching officer;[2] nor is the interest or the possession of the defendant devested; nor does the officer or the plaintiff acquire any right of possession, or right to take the issues or profits. It merely constitutes a lien, which can be made available to the plaintiff only on condition that he recover a judgment in the suit, and proceed according to the existing law to subject the property to sale under execution.[3] And this lien has been held to be as specific as if acquired by the voluntary act of the debtor, and to stand on as high equitable ground as a mortgage.[4] And where a debtor's equity of redemption of mortgaged land was attached, it was decided, that the attachment created a lien which entitled the plaintiff to redeem, and that a decree of foreclosure, on a bill brought after the service of the attachment, did not affect the rights of the attaching creditor, unless he were made a party to the suit.[5] And where an attachment was levied on land which had been previously conveyed by the attachment defendant, and the conveyance was, in a chancery proceeding by other creditors, instituted after the attachment, decreed to be fraudulent and void; it was held, that the attachment lien was entitled to hold the land, in preference to the other creditors, with the same effect as if the fraudulent conveyance had never been made.[6]

§ 240. As just stated, the levy of an attachment upon real estate does not give the attaching officer any right to take the issues and profits thereof. It may be added that, unlike the case of a levy on personalty, *he* acquires no lien upon, or special property in, the land. He is not required or authorized to take possession of it, nor in any event is he accountable for it, or for its rents, issues, or profits. His agency and authority are terminated whenever the duties are performed for which the process was put into his hands. The lien created by the attachment, whatever may be its character, is in the attaching creditor, and

[1] Lyon *v.* Sanford, 5 Conn. 544.

[2] Scott *v.* Manchester Print Works, 44 New Hamp. 507.

[3] Taylor *v.* Mixter, 11 Pick. 341; Scott *v.* Manchester Print Works, 44 New Hamp. 507; Saunders *v.* Columbus L. I. Co., 43 Mississippi, 583; McClellan *v.* Lipscomb, 56 Alabama, 255; Grigg *v.* Banks, 59 Ibid. 311; Phillips *v.* Ash, 63 Ibid. 414. In Missouri, it was held, that this lien is not lost, so as to give priority to a junior judgment, by an agreement between the attaching plaintiff and defendant, that if the latter will confess judgment, execution shall be stayed for one year. Ensworth *v.* King, 50 Missouri, 477.

[4] Carter *v.* Champion, 8 Conn. 549

[5] Lyon *v.* Sanford, 5 Conn. 544; Chandler *v.* Dyer, 37 Vermont, 345.

[6] McKinney *v.* Farmers' Nat. Bk., 104 Illinois, 180.

he only can release or discharge it. Where, therefore, the law required, in order to a valid attachment of real estate, that a copy of the writ, with the officer's return thereon, should be deposited in the office of the town clerk, and that was done; but the officer afterwards withdrew the copy from the town clerk's office, and erased his return therefrom, and substitued a return of an attachment of personalty; it was held, that such withdrawal and erasure did not affect the plaintiff's lien on the property.[1]

§ 241. The right to attach real estate extends as well to undivided interests as to interests in severalty. Therefore where land descended to several children, who made partition of it among themselves by deed, and a creditor of one of the children, not having either actual or constructive notice of the partition, attached all his debtors' undivided share in the estate; it was held, that the attachment created a lien which was not defeated by the partition.[2] And where an attachment was levied on the undivided interest of a debtor in a tract of land, and his cotenant afterwards filed a petition for partition and obtained it, without any notice, actual or constructive, to the attaching creditor, who perfected his judgment, obtained execution, and levied it on the debtor's undivided interest, and then instituted suit for a partition; it was held, that the first partition, pending the attachment, did not affect the rights of the attaching creditor, and partition was decreed in his favor.[3] And where an attachment was laid on a debtor's undivided interest in real estate, and, pending the attachment, a partition of the land was had, and the debtor's purparty set off to him in severalty, and the execution in the attachment suit was levied on the part so set off; it was decided that the lien of the attachment continued, notwithstanding the partition, and that the execution was properly levied on the several property.[4]

§ 242. The time when an attachment of real estate is actually effected might, in many instances, be of much importance. It would seem to be an undoubted principle, that such attachment would have no force until *completed* according to the existing statutory requirements. This view is sustained by a case in New Hampshire, which arose under the statute of that State, requiring a copy of the original writ and return to be left

[1] Braley *v.* French, 28 Vermont, 546.
[2] McMechan *v.* Griffing, 9 Pick. 537.
[3] Munroe *v.* Luke, 19 Pick. 89.
[4] Crosby *v.* Allyn, 5 Maine, 453; Argyle *v.* Dwinel, 29 Ibid. 29.

with the town clerk, in order to constitute an attachment. A. conveyed to B. certain real estate on the 10th of May, and the deed was recorded on the 13th of that month. On the 11th of the same month the premises were attached under a writ issued against A., and on that day the sheriff left with the town clerk a copy of the writ and his return thereon. Some time after the deed from A. to B. was recorded, the officer who served the attachment obtained access to the files of the town clerk, and, without the knowledge of either party, altered the copy of his return left there, and having made a similar alteration in his return upon the original writ, caused the writ to be returned. It was upon this amended return that the real estate was afterwards subjected to execution, and the purchaser under the execution was brought in conflict with the grantee in the deed. The court held, that no valid attachment was made until the amended copy of the return was left with the town clerk, and as that took place some time after the deed was recorded, the grantee in the deed was entitled to hold the land.[1]

[1] Cogswell v. Mason, 9 New Hamp. 48.

CHAPTER X.

ATTACHMENT OF PERSONAL PROPERTY.

§ 243. UNDER this head will be considered, I. What interests in, and descriptions of, personal property may be attached; and II. The requisites of a valid attachment of personalty.

§ 244. I. *What Interests in and Descriptions of Personal Property may be attached.* The first general proposition on this point is, that property which cannot be sold under execution cannot be attached.[1] Of course the correlative follows that whatever may be sold under execution may be attached.[2] Money may be attached *in specie*,[3] and may be taken from the defendant's possession, if the officer can take it without violating the defendant's personal security.[4] Bank-notes also may be attached,[5] and so, it is said, may treasury-notes of the United States.[6] Stock in a corporation cannot be attached unless authorized by express statute;[7] and in any State where such attachment is authorized, the authority extends only to the stock of corporations existing in that State, and not to that of corporations in other States.[8] The attachment of the stock of a stockholder has no effect to incumber the property of the company, or to prevent its assignment thereof.[9] In the absence of express

[1] Pierce *v.* Jackson, 6 Mass. 242; Parks *v.* Cushman, 9 Vermont, 320; Halsey *v.* Whitney, 4 Mason, 206; Davis *v.* Garret, 3 Iredell, 459; Nashville Bank *v.* Ragsdale, Peck, 296; Myers *v.* Mott, 29 California, 359.

[2] Handy *v.* Dobbin, 12 Johnson, 220; Spencer *v.* Blaisdell, 4 New Hamp. 198; Goll *v.* Hinton, 7 Abbott Pract. 120.

[3] Turner *v.* Fendall, 1 Cranch, 117; Sheldon *v.* Root, 16 Pick. 567; Handy *v.* Dobbin, 12 Johnson, 220; Harding *v.* Stevenson, 6 Harris & Johnson, 264.

[4] Prentiss *v.* Bliss, 4 Vermont, 513.

[5] Spencer *v.* Blaisdell, 4 New Hamp. 198.

[6] State *v.* Lawson, 7 Arkansas, 391; State *v.* Taylor, 56 Missouri, 492.

[7] Haley *v.* Reid, 16 Georgia, 437; Denton *v.* Livingston, 9 Johnson, 96; Nashville Bank *v.* Ragsdale, Peck, 296; Foster *v.* Potter, 37 Missouri, 525; Howe *v.* Starkweather, 17 Mass. 240; Merchant's M. I. Co. *v.* Brower, 38 Texas, 230; Rhea *v.* Powell, 24 Illinois Appellate, 77; Barnard *v.* Life Ins. Co., 4 Mackey, 63.

[8] Moore *v.* Gennett, 2 Tennessee Ch'y, 375; Plympton *v.* Bigelow, 13 Abbott's New Cases, 173; 93 New York, 592; 63 Howard Pract. 484.

[9] Gottfried *v.* Miller, 104 United States, 521.

statutory authority *choses in action* are not subject to be sold under execution, and therefore are not attachable.[1]

§ 244 *a*. Property exempt by law from execution cannot be attached, unless the defendant consent, or be proceeded against as a non-resident;[2] or, as held in Pennsylvania, unless he shall have fraudulently concealed other property liable to attachment.[3] This rule is not, however, to be extended beyond its terms, as expressed. If the party who might avail himself of the exemption, sell the exempted property, a debt due him therefor may be attached;[4] for, by voluntarily disposing of the exempt property, he voluntarily deprives himself of the benefit of the statutory exemption and waives the privilege it secured.[5] But a clear distinction exists between the proceeds of property exempt from attachment, when it has been voluntarily sold by the debtor, and when taken from him by proceedings against his will, and changed into money. Where such property is converted into a mere right of action, by a proceeding wholly *in invitum*, such right of action and the money collected are also exempted from attachment the same as the property itself.[6]

An officer levying an attachment upon property exempt from execution is liable to the defendant as a trespasser, if he know that it is exempt.[7] But in order to enforce this liability, the defendant, if aware of the levy must, at the time, claim the exemption, or he will be considered to consent to it.[8] Manifestly, he cannot set up such a claim after judgment rendered against him in the attachment suit;[9] much less after a sale of the property

[1] Denton *v.* Livingston, 9 Johnson, 96; Bogert *v.* Perry, 17 Ibid. 346; Ingalls *v.* Lord, 1 Cowen, 240; Harding *v.* Stevenson, 6 Harris & Johnson, 264.

[2] Yelverton *v.* Burton, 26 Penn. State, 351; McCarthy's Appeal, 68 Ibid. 217; Board of Commissioners *v.* Riley, 75 North Carolina, 144.

[3] Emerson *v.* Smith, 51 Penn. State, 90; McCarthy's Appeal, 68 Ibid. 217. In Alabama the Supreme Court said: "It may be gravely doubted whether the law of exemption of this State can be invoked in favor of absconding debtors, and debtors about to remove out of this State." McBrayer *v.* Dillard, 49 Alabama, 174.

[4] Scott *v.* Brigham, 27 Vermont, 561; Knabb *v.* Drake, 23 Penn. State, 489.

[5] Andrews *v.* Rowan, 28 Howard Pract. 126.

[6] Thompson on Homesteads and Exemptions, § 748; Stebbins *v.* Peeler, 29 Vermont, 289; Keyes *v.* Rines, 37 Ibid. 260; Tillotson *v.* Wolcott, 48 New York, 188; Cooney *v.* Cooney, 65 Barbour, 524; Mitchell *v.* Milhoan, 11 Kansas, 617; Andrews *v.* Rowan, 28 Howard Pract. 126; Kaiser *v.* Seaton, 62 Iowa, 463; Mudge *v.* Lanning, 68 Ibid. 641; Whittenberg *v.* Lloyd, 49 Texas, 633; Mann *v.* Kelsey, 71 Ibid. 609; Kirby *v.* Giddings, 75 Ibid. 679.

[7] *Ante*, § 195.

[8] Hadley *v.* Bryars, 58 Alabama, 139; Behymer *v.* Cook, 5 Colorado, 395; Harington *v.* Smith, 14 Ibid. 376.

[9] State *v.* Manly, 15 Indiana, 8; Perkins *v.* Bragg, 29 Ibid. 507. *Sed contra*, Rice *v.* Nolan, 33 Kansas, 28.

under execution, in his presence, and without objection on his part.[1] If the property is a part of a larger quantity than the law exempts, the defendant must, at the time, set apart such portion as he is entitled to under the exemption, or he will be held to have waived his right.[2] And if the debtor is entitled to hold, exempt from attachment, one or the other of two articles, but not both, he must make his election when the attachment is made, if he have the opportunity to do so, or he will be held to have waived his privilege.[3]

In an action against the attaching officer for trespass in attaching exempt property, the burden of proof is on the plaintiff to establish the actual fact of exemption, and notice thereof to the officer. Thus, where groceries and provisions were attached, and it appeared that they were part of a quantity kept by the debtor in his house, both for sale and for the use of his family, and the debtor failed to prove that he had set apart or claimed any of them as exempt, it was held, that he could not make the officer liable.[4] So, where corn was attached, which was part of a crop raised by the attachment defendant, of which he had sold a part, and with a part fed his cattle and swine, and all of which was kept in a building separate from his dwelling, without any portion being set apart for the use of his family; it was held, in an action for trespass against the officer, that the plaintiff must prove the corn to have been procured and intended by him as provision for his family.[5] So, where an officer attached two articles of household furniture, he was held not liable, because the plaintiff did not prove that he had not left other household furniture sufficient in kind and value to make up the amount exempted by law.[6] So, where a debtor was entitled to one cow exempt from attachment, and an officer attached a cow of the debtor's and was sued for trespass; it was considered necessary to a recovery for the plaintiff to show that the cow was the only one he owned.[7] So, where articles of furniture were attached, it was held necessary, in order to charge the officer as a trespasser, for the plaintiff to show that they were a part of his household effects, and therefore exempted from attachment.[8]

If the law require the officer to have an inventory and appraisement of attached goods made, he has a right to hold the

[1] Grady *v.* Bramlet, 59 California, 105.
[2] Nash *v.* Farrington, 4 Allen, 157; Clapp *v.* Thomas, 5 Ibid. 158; Smith *v.* Chadwick, 51 Maine, 515.
[3] Colson *v.* Wilson, 58 Maine, 416; Buzzell *v.* Hardy, 58 New Hamp. 331.
[4] Nash *v.* Farrington, 4 Allen, 157.
[5] Clapp *v.* Thomas, 5 Allen, 158.
[6] Gay *v.* Southworth, 113 Mass. 333.
[7] Howard *v.* Farr, 18 New Hamp. 457.
[8] Bourne *v.* Merritt, 22 Vermont, 429; Rollins *v.* Allison, 59 Ibid. 188.

goods until that can be done; and he will not be liable to an action of trespass for unlawfully taking goods exempt from attachment, until he has time to make the inventory and appraisement.[1]

§ 244 *b*. As to articles of personal property, each of which is of such a kind as to have a separate identity, and to be easily distinguishable from all others, as in the case of animals, for example, the Supreme Court of Massachusetts said, it is always understood that it is the duty of the officer to leave in the owner's possession as many of each kind as are exempted from seizure; and that the omission of the owner to elect which animals he will hold as exempt, is no waiver of the exemption.[2]

§ 244 *c*. Property, the sale of which is penal, cannot be attached. Where, therefore, the sale of spirituous liquors was forbidden by law, it was decided that they could not be attached, because their subsequent sale under execution would be illegal.[3] And where, under a law of that description, liquors were delivered to a railroad company for transportation, and were attached and taken from it in a suit against the owner, and the company was sued by the owner for failing to deliver the liquors according to the contract; it was held, that the attaching officer was a trespasser in seizing the liquors, and that the company was liable, though the attachment was made without fraud or collusion on its part, against its will, and with no knowledge that the property attached was spirituous liquor.[4]

§ 244 *d*. One of the indications of the tendency to extend the operation of the remedy by attachment is the recent adoption in several States of provisions authorizing the seizure of evidences of debt, and their sale under execution. In New York, for instance, the words "personal property," as used in the Code of Procedure, are declared to include "money, goods, chattels, things in action, and evidences of debt." Under this Code, an attachment was obtained against a railroad company, and was attempted to be levied on certain bonds made by the company, which had never been negotiated, but were deposited with a

[1] Bonnel *v.* Dunn, 5 Dutcher, 435.

[2] Savage *v.* Davis, 134 Mass. 401; Copp *v.* Williams, 135 Ibid. 401.

[3] Nichols *v.* Valentine, 36 Maine, 322. *Sed contra*, Howe *v.* Stewart, 40 Vermont, 145.

[4] Kiff *v.* Old Colony, &c. R. R. Co., 117 Mass. 591. See Ingalls *v.* Baker, 13 Allen, 449.

creditor of the company, as collateral security for moneys advanced. It was held, that they were not things in action or evidences of debt, subject to levy, as no purchaser of them could acquire any right to enforce them against the company.[1]

In Wisconsin, under a statute of similar character, authorizing the attachment of "notes, accounts, and other evidences of debt," and their collection by the sheriff, it was held, that those evidences of debt which may be attached by seizure are only such as are complete and perfect evidences in themselves; and it was determined that account-books were no such evidence; that their seizure did not vest the sheriff with any right to collect any account contained in them; and that the only way to reach an indebtedness of such character was by garnishment of the debtor; and that such a garnishment, after the sheriff's seizure, would hold the debt.[2] And so in Minnesota,[3] Arkansas,[4] and Mississippi.[5]

But in any case of the actual seizure of evidences of debt, the seizure creates no lien on the article attached, unless it belonged at the time to the defendant by a legal title, and for the recovery of which he could maintain an action at law. If before levy of the attachment, he had parted with the legal title, even with intent to defraud his creditors, there remained in him for their benefit only an equity; and that the attachment could not reach.[6]

In Nevada, a sheriff seized in execution and took in custody a paper writing among the files of the clerk of the court, containing a statement of the claim of the execution defendant against an estate, regularly allowed by the executors and approved by the judge of the court; and sold the same. The sale was held to convey no title to the claim.[7]

In Missouri, the statute authorizes the attachment of books of account, and placing them in the hands of a receiver, who in his own name may sue and collect the accounts therein contained, and hold the funds subject to the order of the court. And it is there held, that a levy on books of account is not an attachment of the accounts, and that the receiver's notice to

[1] Coddington *v.* Gilbert, 5 Duer, 72; 2 Abbott Pract. 242; 17 New York, 489.

[2] Brower *v.* Smith, 17 Wisconsin, 410.

[3] Swart *v.* Thomas, 26 Minnesota, 141; Lesher *v.* Getman, 30 Ibid. 321; Ide *v.* Harwood, Ibid. 191.

[4] Goodbar *v.* Lindsley, 51 Arkansas, 380.

[5] Boone *v.* McIntosh, 62 Mississippi, 744.

[6] Anthony *v.* Wood, 96 New York, 180; Gibson *v.* Nat. Park Bank, 98 Ibid. 87; Throop G. C. Co. *v.* Smith, 3 Howard Pract. N. S. 290.

[7] Norton *v.* Clark, 18 Nevada, 247.

debtors residing in another State could have no possible legal effect as to them.[1]

§ 245. A fundamental principle is, that an attaching creditor can acquire no greater right in attached property than the defendant had *at the time of the attachment.* If, therefore, the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt.[2] Thus, a chattel pawned or mortgaged is not attachable, in an action against the pawner or mortgagor;[3] unless the pawnee or mortgagee allow it to remain in his possession; in which case it may be attached for his debts.[4] But the pawnee in possession may maintain trespass against an officer attaching the chattel pawned, and recover the whole value in damages, though it was pledged for less; for he is answerable for the excess to the person who has the general property.[5] So, goods ordered, with authority to the vendor to draw on the vendee for the price thereof, cannot be attached for the debt of the latter, before they have been delivered to him, if he failed to pay the draft drawn on him according to its terms.[6] So, goods on which freight and other charges are due cannot be attached, without paying the freight and charges;[7] and if an officer pay the freight, in order to get the goods into his possession, he stands, in respect to the lien for the freight, in the place, and has the rights, of the carrier.[8] So, goods manufactured by one for another cannot be attached in an action against the general owner; for the manufacturer has a lien on them for his work and labor.[9] Property in the hands of a bailee for hire cannot be attached in a suit against the bailor during the term of the

[1] Kreher *v.* Mason, 33 Missouri Appeal, 297.

[2] Babcock *v.* Malbie, 7 Martin, N. S. 139; Hepp *v.* Glover, 15 Louisiana, 461; Powell *v.* Aiken, 18 Ibid. 321; Deloach *v.* Jones, Ibid. 447; Urie *v.* Stevens, 2 Robinson (La.), 251; Oliver *v.* Lake, 3 Louisiana Annual, 78; Stephenson *v.* Walden, 24 Iowa, 84; Provis *v.* Cheves, 9 Rhode Island, 53; Manny *v.* Adams, 32 Iowa, 165; Samuel *v.* Agnew, 80 Illinois, 553.

[3] Badlam *v.* Tucker, 1 Pick. 389; Holbrook *v.* Baker, 5 Maine, 309; Thompson *v.* Stevens, 10 Ibid. 27; Sargent *v.* Carr, 12 Ibid. 396; Picquet *v.* Swan, 4 Mason, 443; Lyle *v.* Barker, 5 Binney, 457; Haven *v.* Low, 2 New Hamp. 13; Anderson *v.* Doak, 10 Iredell, 295; Williams *v.* Whoples, 1 Head, 401; Moore *v.* Murdock, 26 California, 514; Adoue *v.* Seeligson, 54 Texas, 593.

[4] Salinas City Bank *v.* Graves, 79 California, 192.

[5] Lyle *v.* Barker, 5 Binney, 457.

[6] Seymour *v.* Newton, 105 Mass. 272.

[7] DeWolf *v.* Dearborn, 4 Pick. 466; Wolfe *v.* Crawford, 54 Mississippi, 514.

[8] Thompson *v.* Rose, 16 Conn. 71.

[9] Townsend *v.* Newell, 14 Pick. 332.

bailment.[1] The interest of a lessee of personalty may be attached and sold;[2] but that of the lessor thereof cannot be, even though the sale of it by the sheriff be with a reservation of the lessee's right to retain possession during the continuance of the term.[3] And where a statute expressly authorized the attachment of the lessor's interest, by delivering to the lessee a true and attested copy of the process upon which the property is attached, with the return of the officer thereon, describing the property; which was declared to have the same effect as though the property was taken into the possession of the officer; it was held, that the attachment could be made in no other way than that prescribed, and that the officer, in taking the property into his possession, and thereby dispossessing the lessee, was a trespasser, and could not justify under the writ.[4]

Where property has been consigned to a factor, entitled to a privilege thereon, so that the consignor or owner cannot take it out of his hands without paying his claim, a creditor of the owner cannot attach it. In such a case, where the consignee has made acceptances on account of the property, a creditor of the consignor, wishing to take the property out of the hands of the consignee without paying the amount of his acceptances, must show that the acceptances were not made in good faith, and that the consignee is not bound to pay them.[5] And in such case the factor may bring replevin for the property; and his right to maintain the action will not be defeated by his consenting to become keeper of the goods for the attaching officer.[6] So, it was held in South Carolina, that a foreign ship and cargo consigned to one in that State could not be attached in a suit against the owner; the court holding that the consignee has, in contemplation of law, a qualified property in the ship and cargo, and a constructive possession, the moment she comes into port; and from that moment has the direction and management of her, for the benefit of all concerned; and that she is under his power and government, and subject to his orders, and he may therefore be considered, in law, as in possession of the whole property. The court intimated that the proper way to attach the property was by garnishment of the consignee.[7]

[1] Hartford v. Jackson, 11 New Hamp. 145; Truslow v. Putnam, 4 Abbott Ct. of Appeals, 425.

[2] Wheeler v. Train, 3 Pick. 255.

[3] Smith v. Niles, 20 Vermont, 315.

[4] Brigham v. Avery, 48 Vermont, 602.

[5] Lambeth v. Turnbull, 5 Robinson (La.), 264; McNeill v. Glass, 1 Martin, N. S. 261; Skillman v. Bethany, 2 Ibid. 104; Brownell v. Carnley, 3 Duer, 9.

[6] Sewall v. Nicholls, 34 Maine, 582; Brownell v. Carnley, 3 Duer, 9.

[7] Schepler v. Garriscan, 2 Bay, 224; Mitchell v. Byrne, 6 Richardson, 171.

A case of not unfrequent occurrence is that of goods being attached, where the vendor of them to the defendant is entitled to exercise the right of stoppage *in transitu*, and exercises that right while the attachment is pending. In such case the principle announced at the opening of this section undoubtedly applies, and the vendor is not precluded by the attachment from exercising his right of stoppage,[1] even though the goods may, by order of the court, have been sold; he is entitled to the proceeds in the hands of the court.[2]

§ 245 *a*. The point of time at which one so far loses his power over personalty which he has agreed to sell to another, as that it is not subject to attachment for his debt, is a matter of importance, and sometimes of difficulty. The general principle may be stated to be, that that act which changes the control and dominion of property, after an agreement for a sale, — that which supersedes the power and control of the vendor, and transfers it to the vendee, — is a good delivery to pass the property to the latter, and to defeat its attachment for a debt of the former. Thus, where A., in fulfilment of an agreement for a sale to B., shipped goods at Albany, by railroad, to be forwarded to Boston, taking a receipt or way-bill, making them deliverable to himself, and enclosed to B. a written order making them deliverable to B., who, on receipt thereof, notified the agent of the railroad, and at the same time paid the freight; it was held, that there was a sufficient delivery to pass the property from A. to B., though the latter had not reduced it to actual possession, and that it could not be attached for the debt of A., either while *in transitu*, or after its arrival at Boston.[3] So, where A. advanced $6000 to B., on account of pork to be thereafter cut by B., and by him shipped to A. for sale on commission; and a lot of pork was shipped by rail to A.; and while in the hands of the railroad was attached by a creditor of B.; it was held that the delivery of the pork by B. to the carrier was equivalent to a delivery to A., and that after such delivery B. retained no such interest in the pork as could be attached by a creditor of B.; it appearing that the invoice of the pork to A. was accompanied by a letter of advice, stating, "We deliver this load on our indebtedness;"

[1] Dickman *v.* Williams, 50 Mississippi, 500; Calahan *v.* Babcock, 21 Ohio State, 281; Inslee *v.* Lane, 57 New Hamp. 454; Kelly *v.* Deming, 2 McCrary, 453; 5 Federal Reporter, 697; Buckley *v.* Furniss, 15 Wendell, 137; Morris *v.* Shryock, 50 Mississippi, 590; Schwabacher *v.* Kane, 13 Missouri Appeal, 126; Allyn *v.* Willis, 65 Texas, 65.

[2] O'Brien *v.* Norris, 16 Maryland, 122.

[3] Hatch *v.* Bayley, 12 Cushing, 27. See Hatch *v.* Lincoln, Ibid. 31.

and also that the value of the shipment was less than the amount of B.'s indebtedness.[1]

§ 246. The foregoing are instances in which the owner has so far lost his power over the property as that it cannot be attached for his debt. The same result follows in relation to property, in or over which a person has not yet acquired such interest or power as is considered in law to constitute an attachable interest. Thus, where merchants residing in the city of New York received an order for goods from persons residing at a distance, without particular directions as to the manner in which the goods should be forwarded; and the vendors proceeded to select the goods ordered, and a portion of them, after being packed in boxes, were placed on board a vessel for transportation, the cartman taking from the master of the vessel receipts for each load; it was held, that no person but the shipper was entitled to a bill of lading; and the shipper, being also the holder of the receipts, might direct to whom the bill of lading should be made out, and until he should do so, the right of possession remained in himself; and therefore, that there was no such delivery to the purchasers as rendered the goods liable to seizure under an attachment against them.[2] So, where goods are shipped to a factor for sale, to liquidate advances made by him to the shipper, and to hold the balance subject to the shipper's control, the factor acquires no right of property in them until they actually come into his possession, and they may be attached, while *in transitu*, as the shipper's property.[3] So, where goods were ordered from a merchant in Boston by a merchant in New York, to be paid for "on arrival;" and on their arrival, and while in the possession of the carrier, and unpaid for, they were attached in a suit against the purchaser; it was held, that he had acquired no title to them, and that the attachment could not hold them.[4] So, if goods be sold to one for re-sale, to be accounted for at a future day to the vendor, and if sold to be paid for, if not to be returned; while this arrangement is pending, the vendee has no attachable interest in them.[5] So, where, by a parol contract between the parties, A. was to cultivate B.'s

[1] Straus *v.* Wessel, 30 Ohio State, 211. See Johnson *v.* Sharp, 31 Ibid. 611; First National Bank *v.* McAndrews, 5 Montana, 325; 7 Ibid. 150; Brown *v.* Bowe, 42 New York Supreme Ct. 488.

[2] Jones *v.* Bradner, 10 Barbour, 193. See Scholfield *v.* Bell, 14 Mass. 40.

[3] Dickman *v.* Williams, 49 Mississippi, 500.

[4] Clark *v.* Lynch, 4 Daly, 83. See Bancker *v.* Brady, 26 Louisiana Annual, 749.

[5] Meldrum *v.* Snow, 9 Pick. 441.

farm, find part of the seed, harvest the crop, and then take one-half of it as a compensation for his labor, and deposit the other half in such place as B. should direct; and before the crop was harvested A. absconded, being insolvent; it was held, that he had no such interest in the crop as would render it liable to attachment for his debts.[1] So, where A. leased a farm to B., who was to have one-half of the increase and produce, but the stock and produce were to be at A.'s control until sold; B. had not such an interest in the produce as could be attached.[2] So, where, by the terms of the lease of a farm it was stipulated that "all the hay and straw shall be used on said farm," the lessee had no attachable interest in the hay and straw.[3] So, where, by an agreement between a father and his son, the father was to carry on business in the name and on account of the son, and as his agent, and the son was to give the father one-half of the profits, as a compensation for his services; and some property purchased by the father in the name of the son was attached in a suit against the father; it was held, that the father had no attachable interest in the property.[4] So, where property is sold and delivered, upon condition that the title shall not vest in the vendee, unless the price agreed upon be paid within a specified time, the vendee has no attachable interest in the property until performance of the condition.[5] So, if one acquires by purchase the possession of personal property by fraudulent means, he has not such title thereto as will enable his creditors to attach and hold it as against the person from whom it was fraudulently obtained.[6] So, property consigned to a factor cannot be attached for his debt, though he have a lien on it; for his lien does not dispossess the owner until the right is exercised by the factor, whose privilege is a personal one, and cannot be set up against

[1] Chandler *v* Thurston, 10 Pick. 205.

[2] Esdon *v.* Colburn, 28 Vermont, 631; Lewis *v.* Lyman, 22 Pick. 437; Howell *v.* Foster, 65 California, 169. But where a lease provided, that all the produce deposited on land so leased should be at the lessor's disposal, and that he might enter to take it for the payment of any rent that might be in arrear, it was decided that, as against creditors of the lessee, such a provision was neither an absolute sale nor a mortgage, and that the produce could be attached for the lessee's debt. Butterfield *v.* Baker, 5 Pick. 522.

[3] Coe *v.* Wilson, 46 Maine, 314.

[4] Blanchard *v.* Coolidge, 22 Pick. 151.

[5] Buckmaster *v.* Smith, 22 Vermont, 203; Woodbury *v.* Long, 8 Pick. 543; McFarland *v.* Farmer, 42 New Hamp. 386; The Marina, 19 Federal Reporter, 760.

[6] Buffington *v.* Gerrish, 15 Mass. 156; DeWolf *v.* Babbett, 4 Mason, 289; Gasquet *v.* Johnson, 2 Louisiana, 514; Thompson *v.* Rose, 16 Conn. 71; Hussey *v.* Thornton, 4 Mass. 405; Bradley *v.* Obear, 10 New Hamp. 477; Parmele *v.* McLaughlin, 9 Louisiana, 436; Galbraith *v.* Davis, 4 Louisiana Annual, 95; Wiggin *v.* Day, 9 Gray, 97.

the owner by any one but the factor himself.[1] So, goods stored by a third party in a public warehouse, upon which the warehouse company has a lien for storage, cannot be attached for the company's debts; the company having no interest in the goods but its lien for storage, which is not subject to levy.[2] So, property lent to one cannot be attached for his debt.[3] So, a vested remainder in personal property cannot be attached during the continuance of the life estate, and while the property is in the possession of the tenant for life.[4] So, where property was, by written agreement, let by A. to B. for eight months, at a weekly rent, with stipulation that it should belong to B. at the end of the term, if the rent should be paid according to the contract; and on default of any payment, A. to have the right to take immediate possession, and to retain the payments already made; and after B. had made several payments, and a final default of payment, the property was attached by a creditor of B., and A. instituted replevin for it; it was held, that the contract did not constitute a sale, but an executory agreement for a sale at a future day; that A. continued to be the owner; and that B. had no attachable interest in it.[5] So, coin paid to an attorney-at-law, in satisfaction of a debt held by him for collection, cannot be levied on as the property of the party for whom it was collected; for until it is paid over to that party, he acquires no specific interest in *the particular pieces of coin*, but only a right to receive from the attorney the amount of money collected.[6]

§ 246 *a*. Similar to the instances mentioned in the next preceding section is that of pension money awarded to a pensioner of the United States, and in the hands of his attorney or agent, before its payment to the pensioner. Under section 4747 of the U. S. Revised Statutes it is clearly impossible to reach the money by garnishment of the attorney or agent. The section is in these words: "No sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension Office, or any officer or agent thereof, or

[1] Holly *v.* Huggeford, 8 Pick. 73. On the point of the lien of the factor being a personal one, see, also, Kittredge *v.* Sumner, 11 Pick. 50.

[2] Hanchett *v.* First Nat. B'k, 25 Illinois Appellate, 274.

[3] Morgan *v.* Ide, 8 Cushing, 420; Chase *v.* Elkins, 2 Vermont, 290.

[4] Goode *v.* Longmire, 35 Alabama, 668; Carson *v.* Carson, 6 Allen, 397.

[5] Hughes *v.* Kelly, 40 Conn. 148. See Goodell *v.* Fairbrother, 12 Rhode Island, 233.

[6] Maxwell *v.* McGee, 12 Cushing, 137.

is in the course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." But after the money has been paid over to the pensioner, it passes out of the protection of that section, and becomes as subject to attachment as any other money; and though his creditors cannot reach it while it is in his own personal possession,[1] yet they may do so by the garnishment of any person or corporate body with which he may have deposited it;[2] or to whom he may have made a gift of it;[3] and property purchased with it may be attached, and held for the payment of his debts.[4]

§ 247. An interesting question connected with this topic is, whether a husband has an attachable interest in his wife's *choses in action*, before he has reduced them to possession. Upon this subject courts of high authority have taken entirely opposite grounds, and the question cannot be considered as yet settled either way, by weight of authority. In the affirmative it is held, that the wife's *choses in action* are, in virtue of the marriage, vested absolutely in the husband; that he has in law the sole right, during the coverture, to reduce them to possession, to sue for them, to sell them, to release them; and that he has, therefore, an interest in them which he may assign to another, and therefore an interest which may be reached by attachment, and subjected to the payment of his debts. Such are the views expressed in Massachusetts, Maryland, Delaware, Virginia, and Missouri.[5] It is, however, admitted, that if the husband die pending an attachment of his interest, and before the same is finally subjected to his debt, the attachment will fail, because

[1] Folschow *v.* Werner, 51 Wisconsin, 85; Clark *v.* Ingraham, 15 Philadelphia, 646.

[2] Webb *v.* Holt, 57 Iowa, 712; Jardain *v.* Fairton S. F. & B. Association, 44 New Jersey Law, 376; Cranz *v.* White, 27 Kansas, 319; Rozelle *v.* Rhodes, 116 Penn. State, 129; Martin *v.* Hurlburt, 70 Vermont, 364.

[3] Baugh *v.* Barrett, 69 Iowa, 495; Spelman *v.* Aldrich, 126 Mass. 113.

[4] Triplett *v.* Graham, 58 Iowa, 135; Foster *v.* Byrne, 76 Ibid. 295; Friend *v.* Garcelon, 77 Maine, 25. The only case I have discovered, which holds a contrary doctrine to that stated in the text, is Eckert *v.* McKee, 9 Bush, 355, which is badly reported, for it does not show in whose hands the money was when the attachment was served, nor whether the money had ever yet actually come into the hands of the pensioner. The court, quoting the pension law, and referring to Kellogg *v.* Waite, 12 Allen, 529, simply added, "We conclude the fund was not liable to attachment."

[5] Shuttlesworth *v.* Noyes, 8 Mass. 229; Commonwealth *v.* Manley 12 Pick. 173; Holbrook *v.* Waters, 19 Ibid. 354; Wheeler *v.* Bowen, 20 Ibid. 563; Strong *v.* Smith, 1 Metcalf, 476; State *v.* Krebs, 6 Harris & Johnson, 31; Peacock *v.* Pembroke, 4 Maryland, 280; Johnson *v.* Fleetwood, 1 Harrington, 442; Babb *v.* Elliott, 4 Ibid. 466; Vance *v.* McLaughlin, 8 Grattan, 289; Hockaday *v.* Sallee, 26 Missouri, 219.

of the wife's right of survivorship.[1] On the other hand, it is considered, — in the language of the Supreme Court of Pennsylvania, — "that though marriage is in effect a gift of the wife's personal estate in possession, it is but a conditional gift of her chattels in action; such as debts, contingent interests, or money owing her on account of intestacy. Perhaps the husband has in strictness but a right to make them his own by virtue of the wife's power over them, lodged by the marriage in his person. But if these be not taken into his possession, or otherwise disposed of by him, they remain to the wife; and if he destines them so to remain, who shall object? Not his creditors; for they have no right to call on him to obtain the ownership of the wife's property for their benefit; and, until he does obtain it, there is nothing in him but a naked power, which is not the subject of attachment."[2] These are substantially the views also of the courts of New Hampshire, Vermont, North Carolina, and South Carolina.[3]

§ 248. The defendant's interest in personal property need not, in order to its being subject to attachment, be several and exclusive. An interest held by him in common with others may be attached;[4] and the property may be seized and removed, though the rights of the other joint owners may thereby be impaired;[5] and the attaching creditor cannot be held liable for the expenses incurred or the damages caused by its detention pending the decision of the attachment suit.[6] In such case, only the undivided interest of the defendant can be sold, and the purchaser becomes a tenant in common with the other cotenant,[7] and takes it subject to the incumbrances thereon.[8] If the officer

[1] Strong *v.* Smith, 1 Metcalf, 476; Vance *v.* McLaughlin, 8 Grattan, 289; Hockaday *v.* Sallee, 26 Missouri, 219.

[2] Dennison *v.* Nigh, 2 Watts, 90; Robinson *v.* Woelpper, 1 Wharton, 179.

[3] Marston *v.* Carter, 12 New Hamp. 159; Wheeler *v.* Moore, 13 Ibid. 478; Pickering *v.* Wendell, 20 Ibid. 222; Parks *v.* Cushman, 9 Vermont, 320; Short *v.* Moore, 10 Ibid. 446; Probate Court *v.* Niles, 32 Ibid. 775; Arrington *v.* Screws, 9 Iredell, 42; Pressley *v.* McDonald, 1 Richardson, 27; Godbold *v* Bass, 12 Ibid. 202.

[4] Buddington *v.* Stewart, 14 Conn. 404; Marion *v.* Faxon, 20 Ibid. 486; Walker *v.* Fitts, 24 Pick. 191; Goll *v.* Hinton, 7 Abbott Pract. 120, overruling Stoutenburgh *v.* Vandenburgh, 7 Howard Pract. 229, and Sears *v.* Gearn, Ibid. 383.

[5] Remmington *v.* Cady, 10 Conn. 44; Reed *v.* Howard, 2 Metcalf, 36; Lawrence *v.* Burnham, 4 Nevada, 361; Waldman *v.* Broder, 10 California, 378; Bernal *v.* Hovious, 17 Ibid. 541; Veach *v.* Adams, 51 Ibid. 609.

[6] Sibley *v.* Fernie, 22 Louisiana Annual, 163.

[7] Mersereau *v.* Norton, 15 Johnson, 179; Ladd *v.* Hill, 4 Vermont, 164; Veach *v.* Adams, 51 California, 609.

[8] Sibley *v.* Fernie, 22 Louisiana Annual, 163.

sell the whole, it is, as to the cotenant, a conversion, for which he will be liable to the cotenant in trover.[1] In cases of attachment of property jointly owned, if the attachment be dissolved, the officer's liability to the defendant for the property will be discharged by its delivery to the cotenant.[2] The doctrine stated in this section applies to cases other than partnerships; concerning which there is much diversity of decision.

§ 249. Where property is of such nature that an attachment of it would produce a sacrifice and great injury to the defendant, without benefiting the plaintiff, it is not attachable. Such is the rule in relation to the defendant's private papers,[3] his correspondence,[4] and his account books, unless the statute authorize the seizure of such books.[5] Much less would an attachment be considered to create a lien on the accounts contained in the books.[6] This rule applies also to property which is in its nature so peculiarly perishable, that, manifestly, the purpose of the attachment cannot be effected before it will decay and become worthless; as, for instance, fresh fish, green fruits, and the like.[7] And it has been held, that growing crops cannot be attached.[8]

§ 250. Where property is so in the process of manufacture and transition as to be rendered useless, or nearly so, by having that process arrested, and to require art, skill, and care to finish it, and when completed it will be a different thing, it is not subject to attachment. Such are hides in vats, in the process of

[1] Ladd *v.* Hill, 4 Vermont, 164; Bradley *v.* Arnold, 16 Ibid. 382; White *v.* Morton, 22 Ibid. 15; Melville *v.* Brown, 15 Mass. 79; Eldridge *v.* Lancy, 17 Pick. 352; Walker *v.* Fitts, 24 Ibid. 191.

[2] Frost *v.* Kellogg, 23 Vermont, 308.

[3] Oystead *v.* Shed, 12 Mass. 506.

[4] Hergman *v.* Dettlebach, 11 Howard Pract. 46.

[5] Bradford *v.* Gillaspie, 8 Dana, 67; Oystead *v.* Shed, 12 Mass. 506.

[6] Ohors *v.* Hill, 3 McCord, 338.

[7] Wallace *v.* Barker, 8 Vermont, 440. In Penhallow *v.* Dwight, 7 Mass. 34, it was held, that an entry on land for the purpose of levying an execution on unripe corn or other produce, which would yield nothing, but in fact be wasted and destroyed by the very act of severing it from the soil, would be illegal. But such is not the case where the produce, such as corn and potatoes, is ripe for the harvest. Heard *v.* Fairbanks, 5 Metcalf, 111.

[8] Norris *v.* Watson, 2 Foster, 364; Howard *v.* Kyte, 69 Iowa, 307. It was, in Massachusetts, sought to establish the rule that hay in a barn could not be attached, because of the difficulty of removing it without loss, and of identifying it; but the court refused to sustain that position. Campbell *v.* Johnson, 11 Mass. 184. And in the same State it was held, that tobacco stored in barns, hanging on poles, in process of curing, might be attached, though in such a condition that it could not be moved without great damage. Cheshire Nat. Bank *v.* Jewett, 119 Mass. 241.

tanning, which, if taken out prematurely and dried, could never be converted into leather, or restored to their former condition.[1] Such, too, are a baker's dough; materials in the process of fusion in a glass factory; burning ware in a potter's oven; a burning brick-kiln; or a burning pit of charcoal. In all such cases, the officer cannot be required to attach; for he should have the right of removal; and he is not bound to turn artist, or conduct, in person or by an agent, the process of manufacture, and be responsible to both parties for its successful termination.[2] But where a pit of charcoal was in part entirely completed, so as not to require any further attention or labor, and the residue had so far progressed in the process that it was in fact completed, but some labor and skill were still necessary, in order to separate and preserve it properly; it was held, that if an officer saw fit to attach and take possession of it, and run the risk of being able to keep it properly, he had a right to do so; and that, if any portion of the coal should, through the want of proper care and attention on his part, be destroyed, the owner could not maintain trespass against him for such non-feasance; and that the attaching creditor was not liable therefor, unless the omissions were by his command or assent.[3]

§ 251. Property *in custodia legis* cannot be attached. Thus, goods attached by one officer and in his possession cannot be attached by another officer;[4] nor can property which has once been attached, and released to the defendant on his executing a delivery bond therefor, with sureties, be again attached while liable to be required to be delivered under that bond.[5] So, goods held by a collector of the revenue of the United States, to enforce payment of, or as security for, the duties thereon, are not attachable by a creditor of the importer.[6] So, a ship in the possession of a sheriff, under an attachment issued out of a State court, cannot be attached by a marshal of the United States, under a warrant in admiralty.[7] Nor can property attached by an officer of a United States court be taken out of his hands by an officer under process issued by a State court,[8] unless the former

[1] Bond *v.* Ward, 7 Mass. 123.

[2] Wilds *v.* Blanchard, 7 Vermont, 138.

[3] Hale *v.* Huntly, 21 Vermont, 147.

[4] *Post*, § 267.

[5] *Post*, §§ 267, 331; Roberts *v.* Dunn, 71 Illinois, 46. See Thompson *v.* Marsh, 14 Mass. 269; Hagan *v.* Lucas, 10 Peters, 400.

[6] Harris *v.* Dennie, 3 Peters, 292.

[7] The Robert Fulton, 1 Paine, 620; The Oliver Jordan, 2 Curtis, 414; Taylor *v.* Carryl, 24 Penn. State, 259, and 20 Howard Sup. Ct. 583. See Metzner *v.* Graham, 57 Missouri, 404.

[8] Freeman *v.* Howe, 24 Howard Sup. Ct. 450; Moore *v.* Withenburg, 13 Louis-

give unqualified consent thereto; the effect of which has been held to be a temporary relinquishment of control over the property.[1] And if an officer in possession of goods under a levy consents that another officer levy an attachment thereon, but without disturbing his possession, and agrees that, after satisfaction of his claims, he will hold the goods as bailee of the other officer, the second levy is lawful.[2]

Repeated attempts have been made to levy attachments or executions upon money collected under execution; but such money, while in the hands of the officer who collected it, has uniformly been held to be *in custodia legis*, and for that and other reasons not subject to such levy.[3] This rule, however, applies only where the sheriff is bound, *virtute officii*, to have the money in hand to pay to the execution plaintiff; and not to cases in which he has in his possession, after satisfying the execution, a surplus of money, raised by the sale of property. Such surplus is the property of the execution defendant, and being held by the sheriff in a private, and not in his official, capacity, it may be attached in his hands.[4]

Upon the principle that property *in custodia legis* is exempt from attachment, money paid into the hands of a clerk or prothonotary of a court on a judgment,[5] or in his possession in virtue of his office,[6] cannot be attached. So, of money paid into court.[7] So, of property in the hands of an administrator, which will belong to the defendant as distributee, after settlement of the administrator's accounts.[8] So, property in the hands of an executor cannot be attached in a suit against a residuary legatee or a devisee.[9] So property of a debtor, in the hands of his as-

iana Annual, 22; Lewis *v.* Buck, 7 Minnesota, 104.

[1] Smith *v.* Bauer, 9 Colorado, 380; Weil *v.* Smith, 11 Ibid. 310.

[2] Davidson *v.* Kuhn, 1 Disney, 405.

[3] Turner *v.* Fendall, 1 Cranch, 117; Prentiss *v.* Bliss, 4 Vermont, 513; First *v.* Miller, 4 Bibb, 311; Dubois *v.* Dubois, 6 Cowen, 494; Crane *v.* Freese, 1 Harrison, 305; Dawson *v.* Holcombe, 1 Ohio, 135; Reddick *v.* Smith, 4 Illinois (3 Scammon), 451; Thompson *v.* Brown, 17 Pick. 462; Conant *v.* Bicknell, 1 D. Chipman, 50; Farmers' Bank *v.* Beaston, 7 Gill & Johnson, 421; Jones *v.* Jones, 1 Bland, 443; Blair *v.* Cantey, 2 Speers, 34; Burrell *v.* Letson, 1 Strobhart, 239; Clymer *v.* Willis, 3 California, 363; Hardy *v.* Tilton, 68 Maine, 195. These authorities bear on the question of seizing the money *in specie*. For those applicable to an attempt to reach it by garnishment, see *post*, § 506.

[4] Orr *v.* McBride, 2 Carolina Law Repository, 257; Watson *v.* Todd, 5 Mass. 271; Davidson *v.* Clayland, 1 Harris & Johnson, 546; Tucker *v.* Atkinson, 1 Humphreys, 300.

[5] Ross *v.* Clarke, 1 Dallas, 354; Alston *v.* Clay, 2 Hayward (N. C.), 171.

[6] Hunt *v.* Stevens, 3 Iredell, 365.

[7] Farmers' Bank *v.* Beaston, 7 Gill & Johnson, 421; Mattingly *v.* Grimes, 48 Maryland, 102.

[8] Elliott *v.* Newby, 2 Hawks, 21; Young *v.* Young, 2 Hill (S. C.), 425.

[9] Thornhill *v.* Christmas, 11 Robinson (La.), 201; Bickle *v.* Chrisman, 76 Virginia, 678.

signee, appointed under the insolvent law of a State, cannot be reached by garnishment of the assignee.[1] So, property of a person who has been judicially found to be insane cannot be attached in the hands of his guardian.[2] So, where, under a creditor's bill, a receiver has been appointed by the court and placed in charge of the property, the title of which is in controversy, the property cannot be attached by another creditor.[3] So, garnishment has the effect to place the property in the garnishee's hands in the custody of the law, and an officer has no right, after the garnishment, to take the property from the garnishee[4] under another attachment or under an execution; and in Nebraska, in an action to determine the priority of liens among a number of creditors, an injunction was granted to prevent execution creditors from selling the property under their executions until the final determination of the case.[5] But in Massachusetts it was decided that, though garnishment is an attachment of the effects in the garnishee's hands, yet they may be attached and taken into the possession of the officer, subject to the lien of the creditor who effected the garnishment.[6]

A case of interest and importance is reported in Louisiana, in which the doctrine now under consideration was applied. A suit in chancery was instituted in Memphis, Tennessee, by stockholders of a bank there, against the bank and its president and directors; in which a receiver was appointed, an injunction obtained, and an order for the delivery of the assets of the bank to the receiver served on the president; who, during an unsuccessful attempt to enforce the process of the court, obtained possession of the assets, and ran off with them to New Orleans, where they were attached in his hands by a creditor of the bank, and were claimed in the attachment suit by the receiver appointed by the court in Tennessee. The New Orleans court promptly ordered them to be released from the attachment, and delivered to the receiver.[7] This case is to be distinguished from that of a receiver of a corporation, appointed by a court of the

[1] Lord *v.* Meachem, 32 Minnesota, 66.

[2] Hale *v.* Duncan, Brayton, 132; Ross *v.* Edwards, 52 Georgia, 24.

[3] Perego *v.* Bonesteel, 5 Bissell, 66.

[4] *Post*, § 453; Scholefield *v.* Bradlee, 8 Martin, 495; Brashear *v.* West, 7 Peters, 608; Dennistoun *v.* New York C. & S. F. Co., 6 Louisiana Annual, 782; Reed *v.* Fletcher, 24 Nebraska, 435; Northfield K. Co. *v.* Shapleigh, Ibid. 635.

[5] Northfield K. Co. *v.* Shapleigh, 24 Nebraska, 635.

[6] Burlingame *v.* Bell, 16 Mass. 318; Swett *v.* Brown, 5 Pick. 178.

[7] Paradise *v.* Farmers' and Merchants' Bank, 5 Louisiana Annual, 710. See Wingate *v.* Wheat, 6 Louisiana Annual, 238; Myers *v.* Myers, 8 Ibid. 369.

State in which the corporation exists, seeking to reclaim property of the corporation in another State, where it was attached by a creditor of the corporation residing in the latter State, before the receiver reduced it to his possession. There it is held, that the attachment will hold the property.[1]

In Alabama, an attachment was placed in the hands of a sheriff, and, before its levy, a writ of seizure was issued by a court of chancery, and directed to the same officer. With both writs in his hands he attempted to execute both at the same time; but it was held, that the attachment was inoperative, and must give way; that he could not qualify and restrict the custody which he took for the court, under the writ of seizure, with the levy of the attachment, unless he had the property under his control; and the moment he acquired that control, the property was in the custody of the court.[2]

§ 252. It has been attempted to apply in this country the rule of the English law of distress, exempting from seizure whatever is in a party's present use or occupation; but the attempt has met with only partial success. In Tennessee, a levy on a blacksmith's tools while he was using them, was sustained.[3] And so, in Massachusetts, was an attachment of a stage-coach, actually in use.[4]

Those were instances of personal property not worn about the defendant's person. In regard to property so worn, the English doctrine in relation to distress was fully adopted in Massachusetts, in a case where an officer into whose hand the defendant placed a watch, to compare its weight with that of another, took it, under an attachment, from the person of the defendant, by severing a silk band which passed about his neck, and to which the watch was attached. The court ruled that the seizure was wrongful, and that the watch could not be held under the attachment.[5] So, where one charged with a crime was committed to jail, and the sheriff searched him and took from his possession two watches and a sum of money; upon which the sheriff levied an attachment; it was held, that those articles had no connection with, and were not fruits of, the crime charged; that the sheriff's personal possession of them should be regarded as the personal possession of the prisoner; and that they were no more liable to attachment than if they were in the prisoner's

[1] Dunlop *v.* Paterson F. I. Co., 19 New York Supreme Ct. 627.

[2] Read *v.* Sprague, 34 Alabama, 101.

[3] Bell *v.* Douglass, 1 Yerger, 397.

[4] Potter *v.* Hall, 3 Pick. 368.

[5] Mack *v.* Parks, 8 Gray, 517.

pockets.[1] If, however, the officer, acting under other process, lawfully separate the property from the person of the defendant, without the purpose thereby to open the way to its attachment, he may attach it under writs subsequently coming into his hands.[2]

§ 252 *a*. The property of individuals or corporations who owe duties to the public, is not for that reason exempted from liability to attachment, except so long as it is in actual use in the discharge of such duty. Thus, where a steamboat was attached, which was ordinarily employed by her owner in transporting the mail between New Orleans and Mobile, but at the time of the attachment was not so engaged, and had not a mail on board; her connection with the mail service was urged as a ground for releasing her from the attachment, because the seizure was a violation of the act of Congress against obstructing the mails; but this position was overruled, and the attachment sustained.[3] And so in regard to the rolling stock of a railroad.[4] But where an officer attached a mail wagon and two horses which were at the time in use upon the mail route in carrying the mail, the attachment was held to be a violation of the law of the United States against obstructing the passage of the mail, and therefore illegal.[5]

§ 253. It is not necessary that the defendant's property, in order to be subject to attachment, should be in his possession. It may be attached wherever found.[6]

§ 253 *a*. Personal property found in the defendant's possession is presumed to be his, if nothing appear to the contrary, and may and should be attached as such.[7] If an officer omit to attach it

[1] Commercial Ex. Bk. *v.* McLeod, 65 Iowa, 665. See Dahms *v.* Sears, 13 Oregon, 47.

[2] Closson *v.* Morrison, 47 New Hamp. 482.

[3] Parker *v.* Porter, 6 Louisiana, 169. In Massachusetts the question was raised whether the boat, cable, and anchor of a vessel could be attached and separated from the vessel. The court said that this might depend on the situation of those articles in relation to the vessel. If taken when in use and necessary to her safety, the taking would subject the party taking them to damages. But if the vessel were at a wharf, and her cable and anchor and boat not in use, there was no reason why they might not as well be taken as the harness of a carriage, or the sails and rigging of a vessel when separated from the hull and laid up on shore. Briggs *v.* Strange, 17 Mass. 405.

[4] Boston C. & M. R. R. Co. *v.* Gilmore, 37 New Hamp. 410.

[5] Harmon *v.* Moore, 59 Maine, 428.

[6] Graighle *v.* Notnagle, Peters, C. C. 245; Livingston *v.* Smith, 5 Peters, 90.

[7] Killey *v.* Scannell, 12 California, 73; Salinas City Bank *v.* Graves, 79 Ibid. 192; Harvey *v.* Jewell, 84 Georgia, 234.

when so found, and when its attachment is necessary for the plaintiff's security, he cannot be excused, unless he prove that, notwithstanding such appearances, the property was not in fact the defendant's, — in which case the burden of proof rests upon the officer; or, unless where there were reasonable grounds to suspect that the defendant was not the owner, the plaintiff refused — what the officer in such cases has always a right to demand[1] — to indemnify the officer for any mistake he might make in conforming to the plaintiff's direction.[2] In an action against an officer for such an omission the burden of proof of damage is on the plaintiff; damage cannot be inferred.[3]

§ 253 *b*. If the owner of goods, to prevent their being attached for his debt, represent that they belong to another; and the party to whom the representation is made, believing it to be true, attaches the goods as the property of him to whom the owner represented them to belong; and the owner bring trover for the goods; he is estopped from showing that his representation was false, though when he made it he had no notice of the debt on which the goods were attached, and had no intention to deceive the party who attached them.[4]

§ 254. The possession of personal property, though an *indicium* of ownership, does not render it liable to attachment for the debt of the possessor who is not the owner, unless, perhaps, his possession be fraudulent and intended for colorable purposes.[5] Thus, where a son purchased a farm and stocked it, with a view to furnishing a home for an indigent father, and permitted the father to reside and labor here; the products of the farm were held not subject to attachment for the father's debts.[6] So, where one delivers to a workman materials to be manufactured; the article into which the materials are wrought cannot, when finished, be attached as the property of the workman, even though he should have put into it materials of his own.[7]

§ 255. II. *Requisites of a valid Attachment of Personalty.* When an attachment is delivered to an officer, no lien on the de-

[1] Bond *v.* Ward, 7 Mass. 123; Sibley *v.* Brown, 15 Maine, 185; Smith *v.* Cicotte, 11 Michigan, 383; Ranlett *v.* Blodgett, 17 New Hamp. 298; Chamberlain *v.* Beller, 18 New York, 115.

[2] Bradford *v.* McLellan, 23 Maine, 302.

[3] Wolfe *v.* Dorr, 24 Maine, 104.

[4] Horn *v.* Cole, 51 New Hamp. 287.

[5] Moon *v.* Hawks, 2 Aikens, 390; Walcot *v.* Pomeroy, 2 Pick. 121.

[6] Brown *v.* Scott, 7 Vermont, 57.

[7] Stevens *v.* Briggs, 5 Pick. 177; Gallup *v.* Josselyn, 7 Vermont, 334.

fendant's property is thereby created, but a levy is necessary;[1] and the first levy obtains the first right to satisfaction,[2] unless, as in some States, all the defendant's creditors are allowed to come in and share equally the avails of the first attachment. Hence the necessity that the officer should proceed at once with the execution of the writ. And, as unnecessary delay in completing the attachment might open the way for other officers, having other writs, to seize the property, the first attaching officer should continue the execution of the process, with as little intermission as possible, until his duty is completed.

§ 255 *a*. What will constitute a levy as against the defendant, is a different question from what will constitute one as against third persons. A levy may be good as against the former, that would not be as against the latter. But this distinction is not based on any difference in the legal requisites of a levy, but on the fact that the conduct of the defendant, either by positive or negative acts, may amount to a waiver, or an estoppel, or agreement that that shall be a levy which, without such conduct, would not be sufficient.[3] In either case, however, the general principle may be laid down, that the acts of the officer, as to asserting his rights, and devesting the possession of the defendant, should be of such character as would subject him to an action as a trespasser, but for the protection of the process.[4]

§ 256. An officer, in attaching personalty, must actually reduce it to possession, so far as, under the circumstances, can be done;[5] though in doing so, it is not necessary that any notoriety

[1] *Ante*, § 221.

[2] *Ante*, § 231; Crowninshield *v.* Strobel, 2 Brevard, 80; Robertson *v.* Forrest, Ibid. 466; Bethune *v.* Gibson, Ibid. 501; Crocker *v.* Radcliffe, 3 Ibid. 23.

[3] Taffts *v.* Manlove, 14 California, 47.

[4] Beekman *v.* Lansing, 3 Wendell, 446; Westervelt *v.* Pinkney, 14 Ibid. 123; Camp *v.* Chamberlain, 5 Denio, 198; Goode *v.* Longmire, 35 Alabama, 668; Abrams *v.* Johnson, 65 Ibid. 465; McBurnie *v.* Overstreet, 8 B. Monroe, 300; Allen *v.* McCalla, 25 Iowa, 464.

[5] Lane *v.* Jackson, 5 Mass. 157; Ashmun *v.* Williams, 8 Pick. 402; Lyon *v.* Rood, 12 Vermont, 233; Taintor *v.* Williams, 7 Conn. 271; Hollister *v.* Goodale, 8 Ibid. 332; Odiorne *v.* Colley, 2 New Hamp. 66; Huntington *v.* Blaisdell, Ibid. 317; Dunklee *v.* Fales, 5 Ibid. 527; Bryant *v.* Osgood, 52 Ibid. 182; Chadbourne *v.* Sumner, 16 Ibid. 129; Blake *v.* Hatch, 25 Vermont, 555; Gale *v.* Ward, 14 Mass. 352; Stockton *v.* Downey, 6 Louisiana Annual, 581; Woodworth *v.* Lemmerman, 9 Ibid. 524; Learned *v.* Vandenburgh, 7 Howard Pract. 379; Gates *v.* Flint, 39 Mississippi, 365; Smith *v.* Orser, 43 Barbour, 187; Culver *v.* Rumsey, 6 Bradwell, 598; Crisman *v.* Dorsey, 12 Colorado, 567; Root *v.* Railroad Co., 45 Ohio State, 222.

should be given to the act, in order to make it effectual.[1] What is an actual possession, sufficient to constitute an attachment, must depend on the nature and position of the property. In general, it may be said, that it should be such a custody as will enable the officer to retain and assert his power and control over the property, so that it cannot probably be withdrawn, or taken by another, without his knowing it.[2]

In Connecticut, the doctrine is, that, to effect a valid attachment of goods, the officer must have the *actual* possession of them, as contradistinguished from a *constructive* possession. The facts of the case were these: A., having an attachment against B., went to levy it on a barouche in B.'s carriage-house, and obtained, for that purpose, the key of the house. C., having also an attachment against B., went near the house, and concealed himself. When A. opened the door, he declared that he attached all the carriage and harness in the house; but before he actually touched the carriage, C. sprang in and seized it. The court sustained the attachment made by C., on the following grounds: "The only object of attachment is to take out of the defendant's possession, and to transfer into the custody of the law, acting through its legal officer, the goods attached, that they may, if necessary, be seized in execution, and be disposed of, and delivered to the purchaser. Hence, the legal doctrine is firmly established, that to constitute an attachment of goods the officer must have *the actual possession and custody.* That the plaintiff was at the door of the carriage-house, with a writ of attachment in his hand, only proves an intention to attach. To this, no accession is made by the lawful possession of the key, and the unlocking of the door. Suppose, what does not appear, that the key was delivered to him by the owner of the carriage, that he might attach the property; this would be of no account. He might have the constructive possession, which, on a sale, as between vendor and vendee, would be sufficient; but an attachment can only be made by the taking of actual possession. As little importance is attached to the unlocking of the door, and the declaration that the plaintiff attached the carriage. This was not a touching of the property, or the taking of the actual possession. The removal of an obstacle from the way of attaching, as the opening of the door, is not an attachment, nor was the verbal declaration. An attachment is an act done; and not a mere oral annunciation. From these various acts, taken

[1] Hemmenway *v.* Wheeler, 14 Pick. 408; Tomlinson *v.* Collins, 20 Conn. 364.

[2] Hemmenway *v.* Wheeler, 14 Pick. 408.

separately or conjointly, the plaintiff did not obtain the possession and custody of the carriage, and therefore he did not attach the property." [1]

The views expressed in this case, it is believed, are not sustained in any other State; but, on the contrary, the decisions seem to be with unanimity the other way. It has been repeatedly held, that personal property may be attached without the officer touching it.

In Maine, to constitute an attachment, it is not necessary that the officer should handle the goods attached, but he must be in view of them, with the power of controlling and taking them into his possession. Therefore, where it appeared that the officer went upon premises of the defendant with an attachment, and before leaving, declared to a person who was accustomed to work there, that he had attached the property there, and requested the person to forbid any one taking the things away, but did not give the property into the custody of that person, and then left, and did not return to take the property into his possession; the court held, that the attachment might be sufficient, if followed by the continual presence of the officer, or of some one on his behalf.[2]

In New Hampshire, a valid attachment is not effected, unless the articles are taken into the officer's actual custody, or are placed under his exclusive control; by which actual custody and exclusive control is not meant that he must touch and remove every article before an attachment can be deemed valid, but that the articles must be so within his power as to enable him to touch or remove them.[3] In a subsequent case in the same State, where an officer was in a house levying an attachment on furniture, and another officer entered a chamber of the house not yet reached by the first, and attached the articles therein, the court held the proceedings of the first officer to amount to an attachment of the whole effects, and that the second officer's attachment was illegal; and they say: "The whole articles must doubtless be within the power of the officer. That is, they must not be inaccessible to him by their distance, or by being locked up from his reach in an apartment not under his control; or by being so covered with other articles, or so in the custody of another person, that the officer cannot see and touch them." [4] Again, the same court held, that, to make an attachment, the

[1] Hollister *v.* Goodale, 8 Conn. 332. See Adler *v.* Roth, 2 McCrary, 445; 5 Federal Reporter, 895.

[2] Nichols *v.* Patten, 18 Maine, 231.

[3] Odiorne *v.* Colley, 2 New Hamp. 66; Morse *v.* Hurd, 17 Ibid. 246.

[4] Huntington *v.* Blaisdell, 2 New Hamp 317; Cooper *v.* Newman, 45 Ibid. 339.

officer must take possession of the goods; but that it is not necessary that the goods should be removed; but they must, in all cases, be put out of the control of the debtor.[1]

In Vermont, it is unnecessary that the officer should actually touch the property, but he must have the custody or control of it, in such a way as either to exclude all others from taking it, or, at least, to give timely and unequivocal notice of his own custody.[2] Therefore, where an officer attaching goods in a building, fastened the windows, locked the door, and took the key into his possession, it was held a sufficient taking possession of the goods, as respects subsequent attachments, even though he carelessly failed to secure every avenue to the room, and through one unguarded avenue another officer entered and seized the property.[3]

In Massachusetts, the necessity for an actual handling of the property in order to effect an attachment is not recognized. Thus, where the officer went with a writ and took possession of the defendant's store, and locked it up; it was held to be a sufficient attachment of the goods in the store, and valid against a subsequent attachment or mortgage thereof.[4]

In Illinois, the rule is that in order to a valid levy of a writ of attachment upon personal property, the property must be within the view of the officer, and subject to his immediate disposition and control.[5]

In Iowa, under a statute which required the officer to "take the property into his custody, if capable of manual delivery," it was ruled, that to constitute a valid levy the officer should do that which would amount to a change of possession, or something which, but for the writ, would amount to a trespass; and it was held, that a return by the officer that he had attached certain lots of tobacco, which were not removed or in anywise disturbed by him, but suffered to remain where they were found, without his constituting any one to take care of them, was not a valid levy.[6] And in the same State it was decided that the officer did not take into his possession a stock of goods in a store by the mere act of barricading the front door of the building.[7]

[1] Dunklee *v.* Fales, 5 New Hamp. 527.

[2] Lyon *v.* Rood, 12 Vermont, 233. In this case the above-cited case of Hollister *v.* Goodale, 8 Conn. 332, is severely condemned.

[3] Newton *v.* Adams, 4 Vermont, 437; Slate *v.* Barker, 26 Ibid. 647.

[4] Denny *v.* Warren, 16 Mass. 420; Gordon *v.* Jenney, Ibid. 465; Shephard *v.* Butterfield, 4 Cushing, 425; Naylor *v.* Dennie, 8 Pick. 198.

[5] Culver *v.* Rumsey, 6 Bradwell, 598.

[6] Crawford *v.* Newell, 23 Iowa, 453.

[7] Bickler *v.* Kendall, 66 Iowa, 703; Hibbard *v.* Zenor, 75 Ibid. 471.

In Tennessee, it was decided that, to constitute a valid levy, it is necessary that the officer should take the property into his possession; not that he should have it in actual manual possession, but present and under his control. Therefore, where the officer met the defendant on the farm of the latter, in the road, fifty yards from the house, and had a list of the defendant's property then on the farm and in the house, and from this list made an indorsement of a levy upon the writ, the property not being then in the presence or sight of the officer; it was held that this was no valid levy of the writ.[1]

In Colorado, it was held, that the officer's going to the place where the defendant's property was, and indorsing a levy of it on the writ, and notifying the defendant that the property had been attached, was no levy.[2]

In Delaware, this case arose. A constable, having executions which came to his hands at 3 o'clock P. M., levied them upon personal property of the defendant before 5 P. M. On the same day, between 3 and 4 P. M., three writs of attachment came to his hands against the same party, under which he then made inventories of the personalty. Afterwards, at 6.30 P. M., of the same day, other writs of attachment, in favor of other creditors, against the same defendant, came to the constable's hands, on which no inventories were made until after 7.30 P. M. It was admitted that the constable did not take any of the personalty of the defendant under or by virtue of any of the writs of attachment which came to his hands, unless the making of the inventories under those writs amounted in law to a taking of the same, and that he never had the property, or any part of it, in his actual possession under any of the writs of attachment. On the same day, several writs of execution against the same defendant came to the hands of the sheriff, the first at 6 P. M., and the others at 7.30 P. M. The attachment plaintiffs afterwards obtained judgments against the defendant, and under executions issued thereon the constable sold the attached property, and after satisfying the executions under which it was originally seized, had in his hands a surplus arising from the sale; and the question was, whether this surplus was applicable to the attachments levied by the constable, or to the executions in the hands of the sheriff; and this involved the question, whether the attachments had been legally levied at all. The court held, that an attachment is a lien only from the *taking* of the property by the officer;

[1] Connell *v.* Scott, 5 Baxter, 595. [2] Crisman *v.* Dorsey, 12 Colorado, 567.

but that an actual taking into his exclusive possession was not necessary; and that the making of an inventory of the goods by the officer under the attachment, *with a view to the appraisement of them as required by law*, constituted a taking of them in contemplation of law, and from that time the goods were in the legal custody and possession of the constable under the attachments.[1]

But in California, where a sheriff went, a few minutes after midnight, to a closed store, and, without obtaining admittance, stationed himself at the front door, and an assistant at the back door, so that no one could go in or come out, but did not declare that he levied on the contents of the store, and did not know what the contents were; it was held, that no levy was effected, as against an assignment by the defendant in insolvency, made after those acts of the sheriff, and before he obtained an entrance into the store. The court said: "It is too plain for argument that there can be no levy where the officer does not even know the subject of the levy. As well might a sheriff stand in the street and levy on the contents of a banking house, as to stand in a store-door at midnight, and claim that by merely standing there, and preventing any person from coming into the store, he had levied on the contents, whatever they were, of the store; and this without having any knowledge of the general nature of the stock, much less of its particular description or value."[2]

In Alabama, it is held, that to constitute a levy on personal property, the officer must assume dominion over it; and must not only have a view of it, but must assert his title to it by such acts as would render him chargeable as a trespasser, but for the protection of the process. Therefore, where, in a proceeding against an officer for not levying an attachment, he claimed that he had levied it; and it appeared that all he did was to go to the defendant's house, where the property was, and tell a person whom he then appointed bailee of the property, that he had levied an attachment on it, and gave the bailee all the right and power over it which he had by virtue of the levy; and he then returned the attachment as levied; and thereafter the bailee never took any possession of the property, nor gave any receipt or bond for it, but it was left where it had been found; it was decided that the officer had not in fact made a levy, so as to fasten a lien on the property.[3]

[1] Stockley *v.* Wadman, 1 Houston, 350.
[2] Taffts *v.* Manlove, 14 California, 47.
[3] Abrams *v.* Johnson, 65 Alabama, 465. See Powell *v.* McKechnie, 3 Dakota, 319.

§ 257. In all such cases, however, if the officer have not the property under his control, or, so having, he abandon it, the attachment is lost. Therefore, where an officer having an attachment got into a wagon in which the defendant was riding, and to which a horse was harnessed, and told the defendant that he attached the horse, and then rode down street with the defendant, without exercising any other act of possession, and left the horse with the defendant, upon his promising to get a receiptor for it; the court held, that as the horse had not been under the officer's control for a moment, or if it could be considered that he had had an instantaneous possession, it was as instantaneously abandoned, there was no attachment.[1]

§ 258. With regard to heavy and unmanageable articles, there seems to be no necessity for an actual handling to constitute an attachment. Thus, an officer went with an attachment, within view of a quantity of hay in a barn, and declared, in the presence of witnesses, that he attached the hay, and posted up a notification to that effect on the barn-door; and it was held to be a valid attachment as against an officer who had returned a prior attachment of the hay, not evidenced by any act of possession.[2] So, where an officer attached a parcel of hewn stones, lying scattered on the ground, by going among and upon them, and declaring that he attached them; and placed them in charge of the plaintiff, but made no removal of them, nor gave any notice to any third persons of the attachment, nor took any other mode of giving notoriety to the act; it was held to be a valid attachment, because it was manifest that the officer did not intend to abandon the attachment, and that the measures he took, considering the bulky nature and the situation of the property, were sufficient.[3] So, where an officer attached a quantity of iron ore lying on the surface of the ground, by informing the clerk and workmen of the defendant of the attachment, but did not remove the ore; and in consequence of his declaration the workmen were dismissed, and the defendant's operations ceased, and the facts became generally known and talked of; and it appeared that the removal of the ore would have been attended with great expense and serious injury to the property; it was held, that the attachment was valid; that where the removal of attached property

[1] French v. Stanley, 21 Maine, 512. See Libby v. Murray, 51 Wisconsin, 371; Littleton v. Wyman, 69 Iowa, 248.

[2] Merrill v. Sawyer, 8 Pick. 397.

[3] Hemmenway v. Wheeler, 14 Pick. 408; Polley v. Lenox Iron Works, 4 Allen, 329; Lewis v. Orpheus, 3 Ware, 143.

would result in great waste and expense, it may be dispensed with; and that in such case the continued presence of the officer with the property, in person or by agent, is not necessary; it being sufficient if he exercise due vigilance to prevent its going out of his control.[1] The doctrine thus stated, as dispensing with the actual reduction to possession of ponderous articles, was sought, but unsuccessfully, to be applied to an attachment of ripe corn and potatoes in a field, of which an officer returned an attachment, though he had only gone into the field, and appointed an agent to keep the corn and potatoes. It was held, that this was no attachment, and that it was the officer's duty to have severed the produce from the soil, and reduced it to his possession.[2]

§ 258 *a*. In some States legislation has provided for notice of the attachment of ponderous articles, so as to dispense with the necessity of their actual custody by the officer, in order to the preservation of the lien of his attachment. In New Hampshire, for instance, a statute authorizes an officer attaching such property to "leave an attested copy of the writ, and of his return of such attachment thereon, as in the attachment of real estate [that is, by leaving the same at the office of the town-clerk]; and in such case the attachment shall not be dissolved or defeated by any neglect of the officer to retain actual possession of the property." But to be entitled to the protection of this provision, the officer must make such return as will indicate specifically the property he has attached, so as to impart notice to other officers and attaching creditors; in default of which the leaving of the copy of the writ and return with the town-clerk will be of no avail. Thus, where an officer went into a barn in which was a quantity of hay, which he saw, and put up a paper in the barn with the following notice upon it: "I have attached all the hay in this barn in which S. has any interest;" and then made the following return upon the writ: "I attached all the wood, hay, bark, and lumber, lands and tenements, in the town of W., in which the within named defendant has any right, title, interest, or estate; and on the same day I left at the office of the town-clerk of said town a true and attested copy of this writ and of my return indorsed thereon;" it was held, that the return was too indefinite to constitute an attachment as against a sub-

[1] Mills *v.* Camp, 14 Conn. 219; Pond *v.* Skidmore, 40 Ibid. 213; Bicknell *v.* Trickey, 34 Maine, 273.

[2] Heard *v.* Fairbanks, 5 Metcalf, 111.

sequent purchaser of the hay. "By the statute," said the court, "a public record of the return of the property attached is made a substitute for the retention of possession by the officer or his agent, and its purposes would not be subserved, nor its spirit maintained, by any such effort at compliance with the terms of the statute, or by any such construction of its provisions, as should fail to furnish a subsequent attaching creditor, or a purchaser of the property from the debtor, substantially and practically the same information as would be derived from knowledge of the officer's retention of possession at common law." [1]

§ 259. The rule requiring the officer to reduce to his possession personal property attached by him, does not extend to a case in which an attachment is authorized of that which in its nature is incapable of being taken into possession. Such is the case of stock in a bank or other corporation. There, it is sufficient for the officer to take the steps required by the law under which he acts, and to describe the property as so many shares of the particular stock owned by the defendant; and a sale by such a description will carry the title.[2]

In Iowa, the statute declares that "stock in a company is attached by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been so attached;" and under that statute a sheriff's return of an attachment was held not to be a lien on stock of the defendant, where he returned that he "attached B., secretary of the company, as garnishee, by informing him that he was attached as garnishee, and by leaving with him a written notice;" which notice notified him "not to pay any debt due by him to the defendant or hereafter to become due," and that he "must retain possession of all property of the said defendant then or thereafter being in his possession or under his control." [3]

[1] Bryant v. Osgood, 52 New Hamp. 182.

[2] Stamford Bank v. Ferris, 17 Conn. 259.

[3] Mooar v. Walker, 46 Iowa, 164.

CHAPTER XI.

SIMULTANEOUS, SUCCESSIVE, CONFLICTING, AND FRAUDULENT ATTACHMENTS.

§ 260. A COMMON occurrence in the use of the remedy by attachment is for a number of writs in favor of different plaintiffs, to be placed, at the same time or in quick succession, in the hands of officers, against the same defendant, and served on the same property, simultaneously, or at short successive intervals. As such cases usually occur when the defendant is in failing circumstances, or is about to commit, or has committed, some fraud, and the property levied on is supposed to be the only available resource for the satisfaction of his creditors, it is important to ascertain the rules which are to decide between interests which, under such circumstances, are almost certain to come in conflict. This subject is of no importance where, as in some States, the first attachment holds the property, not to the exclusion of all subsequent ones, but for the benefit of all creditors of the defendant who come in and prove their demands, and thereby become entitled to share with the first attacher the avails of his diligence; but where, as in nearly all of the States, the writs hold in the order of their service, its importance is evident.

§ 260 *a*. An interesting case, illustrative of this subject, occurred in California. At 1.40 P. M., an action by attachment was commenced by A. against B., by depositing in the clerk's office of the court a complaint, affidavit, and undertaking, with a request that an attachment should be issued forthwith. Thereupon, A.'s attorney, by whom those papers were filed, and the writ demanded, left the clerk's office and was absent forty-five minutes. On his return, the writ which he had demanded had been completed, and was immediately, without delaying him, placed in his hands. Meantime, in the attorney's absence, and while the clerk was engaged in preparing A.'s writ, the attorney of C. came into the office, and placed in the clerk's hands a

complaint, affidavit, and undertaking, in an action by C. against B., and also demanded an attachment forthwith. He was directed to fill out the blanks, and did so, and thereupon the clerk signed, sealed, and delivered the writ to him at three minutes before two o'clock, and at two o'clock the writ was placed by C.'s attorney in the hands of the sheriff; so that C.'s attachment was issued and placed in the hands of the sheriff twenty-five minutes before A.'s attorney returned to the clerk's office; whereby C. obtained priority of lien upon B.'s effects. A. sued the clerk upon his official bond for damages sustained by his failure to perform his duty in the matter of issuing the writ against B. The court held, that he could not recover, because, though the clerk was bound to issue writs in the order in which they are demanded, yet as A.'s attorney was not present to receive his writ when it was completed, the clerk was not bound in the mean time to delay the issuing of other writs against the same defendant.[1]

§ 261. In general, there is no doubt that the law admits of no fractions of a day; but this rule is subject to exceptions, when necessary to determine priority of right. The case of several attachments levied on the same property on the same day, is one of the exceptions. There, it is held, that they will stand according to the actual time of service, and if a judgment be obtained by a junior attacher in advance of a senior, it will not destroy the priority of lien acquired by the latter.[2]

§ 262. The rights of attaching creditors, who, as against their common debtor, have equal claims to the satisfaction of their debts, must depend on strict law; and if one, by any want of regularity or legal diligence in his proceedings, loses a priority once acquired, it is a case where no equitable principles can afford him relief; where the equities are equal; and where the right must be governed by the rule of law.[3] It has therefore been held, in a case where the defendant was not served with

[1] Lick v. Madden, 36 California, 208.

[2] *Post*, § 265; Tufts v. Carradine, 3 Louisiana Annual, 430; Gomila v. Milliken, 41 Ibid. 116; Stone v. Abbott, 3 Baxter, 319; Garity v. Gigie, 130 Mass. 184. In Pennsylvania, however, it is held, that where several attachments go into the sheriff's hands on the same day, and are executed on that day on the same property, no preference is allowed among them. Yelverton v. Burton, 26 Penn. State, 351.

[3] Suydam v. Huggeford, 23 Pick. 465. See Southern Bank v. McDonald, 46 Missouri, 31; Alley v. Myers, 2 Tennessee Ch'y, 206; Kittredge v. Gifford, 62 New Hamp. 134.

process, that a failure by an officer to make return of an attachment in the manner provided by law, invalidated the attachment as against a subsequent attaching creditor.[1] So, where an officer summoned garnishees, whose names were not at the time inserted in the writ under which he acted, and subsequent attachers made valid service on the same garnishees, they were held to be entitled to move for the discharge of the garnishees from the former writ, and to hold the fund in the hands of the garnishees.[2] It is also ruled that, as against subsequent attaching creditors, the rendition of a judgment in due form and course of law, and the issuing of an execution on that judgment, and duly charging the property therewith, are as necessary as the attachment itself to entitle the plaintiff to priority of satisfaction; and that any departure by him from the course prescribed by law for establishing his right to such satisfaction will discharge his lien under the attachment, as against the claims of subsequent attachers. Hence it was held in Vermont, that a confession of judgment by the defendant, before the time when the action would have been regularly triable,[3] or an appearance and trial, resulting in a judgment for the plaintiff, before the return day of the writ,[4] was a dissolution of the plaintiff's lien under his attachment, as against subsequent attachments. So, where the first of several attachers having a claim large enough to absorb all the property attached, by agreement with the defendant took all the property in satisfaction of his debt, and discontinued his suit; it was decided that, as against the subsequent attachers, who perfected their respective liens by judgment and execution, he acquired no title to the property.[5]

It will be remarked, that, in each of these instances, there was considered to be a substantial departure from the legal mode prescribed for enabling a party to obtain the benefit of his attachment. This is a different matter from mere irregularities; for it is well settled that, though such exist in the proceedings of one attaching creditor, other attaching creditors cannot make themselves parties to the proceedings for the purpose of defeating them on that account.[6] Nor will a bill in equity lie in favor

[1] Stone *v.* Miller, 62 Barbour, 430.
[2] Pratt *v.* Sanborn, 63 New Hamp. 115.
[3] Hall *v.* Walbridge, 2 Aikens, 215.
[4] Murray *v.* Eldridge, 2 Vermont, 388.
[5] Brandon Iron Co. *v.* Gleason, 24 Vermont, 228; Cole *v.* Wooster, 2 Conn. 203.
[6] Kincaid *v.* Neall, 3 McCord, 201; Camberford *v.* Hall, Ibid. 345; McBride *v.* Floyd, 2 Bailey, 209; Van Arsdale *v.* Krum, 9 Missouri, 397; Walker *v.* Roberts, 4 Richardson, 561; Ball *v.* Claflin, 5 Pick. 303; *In re* Griswold, 13 Barbour, 412; Bank of Augusta *v.* Jaudon, 9 Louisiana Annual, 8; Isham *v.* Ketchum, 46 Barbour, 43; Ward *v.* Howard, 12 Ohio State, 158; Seibert *v.* Switzer, 35 Ibid.

of a junior attacher, to set aside a senior attachment on the ground of the insufficiency of the affidavit on which it was issued.[1]

§ 263. In the absence of a statute to the contrary, neither the issue of an attachment[2] nor its lodgment in the hands of an officer,[3] confers any right on the plaintiff in the defendant's property. It is only when the writ is served, that, as between plaintiff and defendant, and generally as between different plaintiffs, its lien takes effect.[4] Hence, when several attachments against the same person are simultaneously served on the same property, they will be entitled to distribute among them the proceeds of the attached property, or the funds in the hands of garnishees. This distribution is not in proportion to the amount claimed under each attachment, but according to the number of the writs, each being entitled to an aliquot part; with this qualification, however, that if the share of any plaintiff be more than sufficient to satisfy his demand, the surplus must be appropriated to any other of the demands which is not paid in full by its distributive share.[5]

This rule was applied, not only to the case of simultaneous attachments by different officers,[6] but where the writs were in the hands of the same officer, and were delivered to him at different times, but served together.[7] In Kentucky, however, it was determined, that, though in the case of distinct officers, the first levy gives the prior lien, yet where several attachments *against the same fund* come in succession to the hands of the same officer or his deputies, it is the duty of the officer to execute them in the order in which they were received. And although when the process comes to the hands of different deputies, this

661; Rudolph *v.* McDonald, 6 Nebraska, 163; Fridenburg *v.* Pierson, 18 California, 152; Harvey *v.* Foster, 64 Ibid. 296; Scrivener *v.* Dietz, 68 Ibid. 1; Jacobs *v.* Hogan, 22 New York Supreme Ct., 197; Henderson *v.* Stetter, 31 Kansas, 56; Nenny *v.* Schluter, 62 Texas, 327.

[1] Fridenberg *v.* Pierson, 18 California, 152.

[2] *Ante*, § 221.

[3] *Ante*, § 221.

[4] *Ante*, § 221.

[5] Shove *v.* Dow, 13 Mass. 529; Sigourney *v.* Eaton, 14 Pick. 414; Rockwood *v.* Varnum, 17 Ibid. 289; Durant *v.* Johnson, 19 Ibid. 544; True *v.* Emery, 67 Maine, 28; Wilson *v.* Blake, 53 Vermont, 305; Davis *v.* Davis, 2 Cushing, 111; Thurston *v.* Huntington, 17 New Hamp. 438; Campbell *v.* Ruger, 1 Cowen, 215; Nutter *v.* Connett, 3 B. Monroe, 199. This rule, however, does not obtain in Pennsylvania, North Carolina, and Tennessee, where the distribution is made *pro rata*. Yelverton *v.* Burton, 26 Penn. State, 351; Hill *v.* Child, 3 Devereux, 265; Freeman *v.* Grist, 1 Devereux & Battle, 217; Porter *v.* Earthman, 4 Yerger, 358; Love *v.* Harper, 4 Humphreys, 113.

[6] Shove *v.* Dow, 13 Mass. 529.

[7] Rockwood *v.* Varnum, 17 Pick. 289.

order of service may, without fault, happen to be reversed, the court, having the fund in its possession under all the attachments, should distribute it according to the rule which should have governed the execution of the process.[1]

§ 263 *a*. In cases of this description, it is not the legal right of the officer who made the attachments to decide the distribution of the fund between the executions in the attachment suits. If he assume to do so, it is at his own peril. His proper course is to refer the matter to the court out of which the executions issue. In such a case, where the officer paid one execution in full, thereby preventing the satisfaction of the other, and it appeared that the judgment which was satisfied was invalid, the officer was charged with the unsatisfied part of the other.[2]

§ 264. Where different writs are in the hands of the same officer, there need be no difficulty in ascertaining whether their service was simultaneous; but when different officers are employed, each intent on obtaining priority, questions of difficulty may occur. A case of this description was where two officers held attachments against the same defendant, and one returned his writ served "at one minute past 12 o'clock A. M.," the other that he served his writ "immediately after midnight" on the same day. The court held, that each of them made the attachment as soon as it could be done after twelve o'clock at night, and that it was impossible to say that either had the priority.[3]

§ 265. Where several writs against the same defendant are served on the same day, and there is nothing in the officer's return, nor on the face of the proceedings, to show a priority in the time of service, it may be presumed that they were served at the same time;[4] and where, in a case of that description, the returns on all the writs, except one, stated the time of the day when the service was made, and that one stated only a service on that day; it was held, that it was neither matter of legal presumption, nor construction, that the latter writ was served at the same time with any of the others. But parol evidence was admitted to show at what time of the day specified in the return

[1] Kennon *v.* Ficklin, 6 B. Monroe, 414; Clay *v.* Scott, 7 Ibid. 554. See Callahan *v.* Hallowell, 2 Bay, 8; Thurston *v.* Huntington, 17 New Hamp. 438; State *v.* Harrington, 28 Missouri Appeal, 287.

[2] Howard *v.* Clark, 43 Missouri, 344.

[3] Shove *v.* Dow, 13 Mass. 529.

[4] Ginsberg *v.* Pohl, 35 Maryland, 505.

the service was in fact made; such evidence being regarded as entirely consistent with the return.[1] In a similar case, where an officer returned an attachment as made at 12 o'clock, noon, it was considered prior in point of time to another attachment returned as made on the same day, indefinitely, without specifying any particular hour. And it was decided in that case, that no amendment of the latter return was admissible, which would destroy or lessen the rights of third persons previously acquired.[2]

§ 265 *a*. Where several writs are executed about the same time, and so near together that, but for the terms of the returns thereon, they would be considered as having been simultaneously made, the officer may indicate the order in which he served them, by returning his attachment under one as subject to an attachment under another; and if he so return them in the order in which he received them, he gives them their rightful precedence.[3]

§ 266. When different officers make attachments so nearly at the same time that it is difficult to determine the question of priority between them, they may settle the dispute by a division of the property, which will be regarded as binding on them, and as precluding either from subsequently raising the question of priority. And if, in such case, one sell the whole of the property, and apply the proceeds to the satisfaction of the execution held by him, the other will be entitled to maintain trover against him for his portion, and in order thereto, need not prove that, in fact, his was the first attachment.[4]

§ 267. Neither the actual custody nor the exclusive control of the same articles of personal property can, at the same time, be in two distinct persons; and therefore, as possession of goods by an officer is an indispensable requisite to a valid attachment of them, it follows that when an officer has levied an attachment on goods, and has them in his custody, no other officer can seize them under another writ; for in order to attach, he must lawfully take possession of them; but this he cannot do, since the

[1] Brainard *v.* Bushnell, 11 Conn. 16; Garity *v.* Gigie, 130 Mass. 184.

[2] Fairfield *v.* Paine, 23 Maine, 498; Taylor *v.* Emery, 16 New Hamp. 359. See Bissell *v.* Nooney, 33 Conn. 411.

[3] Thurston *v.* Huntington, 17 New Hamp. 438.

[4] Lyman *v.* Dow, 25 Vermont, 405.

first attaching officer has, by his prior attachment, a special property in them, and they are in the custody of the law, and it would introduce confusion to admit of several officers contending for the possession of attached goods.[1] And it matters not that the first attaching officer had levied upon more than was sufficient to satisfy the writ under which he acted.[2] The same rule prevails where the property is not in the actual custody of the first officer, but in the hands of a receiptor, to whom he has intrusted it. The possession of the receiptor, being that of the officer, cannot be violated by taking the goods from his custody under another attachment.[3] Garnishment of the officer who made the first levy is the proper resort to reach any surplus which may be in his hands after satisfying his writ, or the whole property if his writ should fail to hold it.[4]

§ 268. If an officer attach property, and it is subsequently taken from his possession by another officer under another attachment against the same defendant, and the property is sold and its avails applied by the second officer upon the execution obtained in the second suit, and the first officer sue the second for the trespass, his right to recover anything more than nominal damages will depend on his liability for the property to the plaintiff in whose favor he attached it; and if that liability has been lost by the failure of the plaintiff to perfect the lien of his attachment, there can be no recovery against the second attaching officer for anything more than nominal damages. In such case the first officer cannot recover upon the ground of any liability on his part to the defendant, since the act of the second officer was justifiable, so far as the defendant is concerned, and

[1] *Ante*, § 251; Watson *v.* Todd, 5 Mass. 271; Vinton *v.* Bradford, 13 Ibid. 114; Burlingame *v.* Bell, 16 Ibid. 318; Odiorne *v.* Colley, 2 New Hamp. 66; Moore *v.* Graves, 3 Ibid. 408; Walker *v.* Foxcroft, 2 Maine, 270; Strout *v.* Bradbury, 5 Ibid. 313; Burroughs *v.* Wright, 16 Vermont, 619; West River Bank *v.* Gorham, 38 Ibid. 649; Lathrop *v.* Blake, 3 Foster, 46; Benson *v.* Berry, 55 Barbour, 620; Oldham *v.* Scrivener, 3 B. Monroe, 579; Robinson *v.* Ensign, 6 Gray, 300; Harbison *v.* McCartney, 1 Grant, 172; Beers *v.* Place, 36 Conn. 578; Adler *v.* Roth, 2 McCrary, 445; 5 Federal Reporter, 895; Heye *v.* Moody, 67 Texas, 615; Bailey *v.* Childs, 46 Ohio State, 557.

[2] Vinton *v.* Bradford, 13 Mass. 114.

[3] Thompson *v.* Marsh, 14 Mass. 269. In Hagan *v.* Lucas, 10 Peters, 400, property had been levied on under execution by a sheriff in Alabama, and claimed by a third person not a party to the execution, who gave bond to redeliver it to the sheriff when the title had been tried; and it was held to be so in the custody of the law, that it could not, while in that condition, be taken under execution by the marshal of a United States Court. See Roberts *v.* Dunn, 71 Illinois, 46.

[4] Locke *v.* Butler, 19 Ohio State, 587; Bailey *v.* Childs, 46 Ibid. 557.

the first officer is not liable over to the defendant for the property.[1]

§ 268 *a*. If an officer levy an attachment on property which has already been attached, and for which a delivery bond has been given, it is his duty to keep it safely, so that it shall be forthcoming to answer the first levy. The neglect of this duty is nonfeasance; and the delivery of the goods to the second attaching creditor, whereby they cannot be reached to satisfy the first levy, is misfeasance; and the officer becomes liable to the first attacher for the goods.[2]

§ 268 *b*. In order to charge an officer with liability for levying an attachment on property previously levied on by another officer, and found in the possession of the sureties in a delivery bond given therefor, notice must be given to him of the prior attachment; and notice to his deputy, whom he authorized to make the levy, at the time he makes the levy, is notice to him.[3]

§ 269. If it be desired to attach property already attached, and in an officer's custody, the writ should be delivered to, and executed by, him; when it will be available to hold the surplus, after satisfying the previous attachment, or the whole if that attachment should be dissolved. In such case no overt act on the part of the officer is necessary to effect the second levy, but a return of it on the writ will be sufficient;[4] and it must be made, in order to perfect the attachment and make it available as a justification for seizing the property.[5] So, where the property is in the hands of a bailee, the officer who placed it there may make another attachment, without the necessity of an actual seizure, by making return thereof, and giving notice to the bailee.[6] And in Louisiana, where attached property was sold by order of court as perishable, and bonds for the price thereof were taken by the sheriff from the purchasers, it was held that the

[1] Goodrich *v.* Church, 20 Vermont, 187.

[2] Scarborough *v.* Malone, 67 Alabama, 570.

[3] Scarborough *v.* Malone, 67 Alabama, 570.

[4] Turner *v.* Austin, 16 Mass. 181; Tomlinson *v.* Collins, 20 Conn. 364; Rogers *v.* Fairfield, 36 Vermont, 641; Perry *v.* Sharpe, 8 Federal Reporter, 15; Wiggin *v.* Atkins, 136 Mass. 292. This rule is equally applicable where a second attachment is made by a different deputy of the sheriff from the one who made the first levy; the act of each being the act of the sheriff. Claflin *v.* Furstenheim, 49 Arkansas, 302.

[5] Wiggin *v.* Atkins, 136 Mass. 292.

[6] Knap *v.* Sprague, 9 Mass. 258; Whittier *v.* Smith, 11 Ibid. 211; Odiorne *v.* Colley, 2 New Hamp. 66; Whitney *v.* Farwell, 10 Ibid. 9; Tomlinson *v.* Collins, 20 Conn. 364.

bonds might be levied upon by the same officer, under an execution in favor of another creditor, subject to the attachment under which the sale was made; the law of that State authorizing a levy on bonds.[1]

§ 270. These rules refer to seizures of goods, and not to cases where property is attached by one officer, by garnishment of the individual in whose possession it may be, and afterwards by another officer, by actual seizure and removal thereof from the garnishee's possession. This, though a proceeding not to be approved, and where the writs issue from different jurisdictions wholly inadmissible, yet may, it seems, be done, where the two writs proceed from the same jurisdiction. The officer making the seizure of the goods will hold them subject to the prior lien of the garnishment. He must keep them until the result of the garnishment is ascertained; when, if the garnishee be charged in respect of them, the officer will be bound to restore them to him and suffer them to be sold; and if he fail to do so he will be liable to the garnishee,[2] or to the plaintiff in the garnishment.[3]

§ 271. If an officer suffer his possession of attached property to be lost, it may be attached by another officer, though the latter be aware of the former attachment having been made, if his knowledge extend not beyond that fact.[4] For it does not follow, that, because he knows an attachment was at one time made, he knows that it still exists; on the contrary, he may well infer, from finding the property no longer in the possession of the officer who first attached it, that the prior attachment had been discharged. But if he know that there is a subsisting attachment, — although the defendant might, at the time, by the permission of the bailee, to whom the property had been intrusted, be in possession of it, — he cannot acquire a lien by attaching it.[5] After he has made a levy, however, notice to him that a prior attachment exists will not affect the validity of the levy.[6]

§ 272. The existence of the proceeding by attachment could hardly fail to give rise to fraudulent attempts to obtain preference, where the property of a debtor is insufficient to satisfy all

[1] Hoy v. Eaton, 26 Louisiana Annual, 169.

[2] Burlingame v. Bell, 16 Mass. 318; Swett v. Brown, 5 Pick. 178.

[3] Rockwood v. Varnum, 17 Pick. 289.

[4] Chadbourne v. Sumner, 16 New Hamp. 129.

[5] Bagley v. White, 4 Pick. 395; Young v. Walker, 12 New Hamp. 502; Morse v. Smith, 47 Ibid. 474.

[6] Bruce v. Holden, 21 Pick. 187.

the attachments issued against him. When it transpires that there are circumstances justifying resort to this remedy, the creditors of an individual usually press forward eagerly in the race for precedence, sometimes to the neglect of important forms in their proceedings, and sometimes without due regard to the rights of others. On such occasions, too, notwithstanding the safeguards generally thrown around the use of this process, and in violation of the sanctity of the preliminary oath, it has been found that men in collusion with the debtor, or counting on his absence for impunity, have attempted wrongfully to defeat the claims of honest creditors, by obtaining priority of attachment, on false demands. There is, therefore, a necessity — apparent to the most superficial observation — for some means by which all such attempts to overreach and defraud, through the instrumentality of legal process, may be summarily met and defeated. Hence provision has been made in the statutes of some States for this exigency; but where such is not the case the courts have broken the fetters of artificial forms and rules, and attacked the evil with commendable spirit and effect.

§ 273. As before remarked,[1] whatever irregularities may exist in the proceedings of an attaching creditor, it is a well-settled rule that other attaching creditors cannot make themselves parties to those proceedings, for the purpose of defeating them on that account.[2] Nor can a subsequently attaching creditor take advantage of any waiver made by the attachment defendant, which causes no substantial injustice to such creditor.[3] But where an attachment is based on a demand not due, or on a fraudulent demand, or one which has in fact no existence, or one for which an attachment could not lawfully issue, it is otherwise; as will appear from a review of the action of courts of a high order of learning and ability.

§ 274. In North Carolina, in the case of several attachments against the same defendant, levied on the same property, a junior attacher was not allowed to impeach a judgment obtained by a senior attacher, on the ground that when the attachment of

[1] *Ante*, § 262.

[2] Kincaid *v.* Neall, 3 McCord, 201; Camberford *v.* Hall, Ibid. 345; McBride *v.* Floyd, 2 Bailey, 209; Van Arsdale *v.* Krum, 9 Missouri, 397; Walker *v.* Roberts, 4 Richardson, 561; Ball *v.* Claflin, 5 Pick. 303; *In re* Griswold, 13 Barbour, 412; Isham *v.* Ketchum, 46 Ibid. 43; Bank of Augusta *v.* Jaudon, 9 Louisiana Annual, 8; Fridenburg *v.* Pierson, 18 California, 152; Ward *v.* Howard, 12 Ohio State, 158; Bateman *v.* Ramsey, 74 Texas, 589; Rudolf *v.* McDonald, 6 Nebraska, 163.

[3] Rudolf *v.* McDonald, 6 Nebraska, 163.

the latter was obtained, the defendant's debt to him was not due;[1] and in Iowa it was held, that a junior attacher could not intervene in a prior attachment suit, to show that it was prosecuted by collusion between the parties thereto, for the purpose of hindering, delaying, and defrauding the defendant's creditors; but that relief in such case could only be administered by a court of equity.[2] But these rulings are inconsistent with the general current of decision elsewhere.

§ 275. In New Hampshire, so far as we have been enabled to discover, there is no statute authorizing an attaching creditor to impeach the good faith of previous attachments; but a practice prevails there, which effectually opens the door for such salutary investigations; as is exhibited by the following case. One sued out an attachment, and caused it to be levied. Afterwards creditors of the same defendant, who had subsequently caused the same property to be attached, suggested to the court, that the suit of the prior attacher was prosecuted collusively between him and the defendant, for the purpose of defrauding the creditors of the latter, and that there was, in fact, nothing due from the defendant to the plaintiff. Thereupon, — the creditors making the suggestion having given security to the plaintiff to pay all such costs as the court should award on account of their interference in the suit, — the court ordered that the plaintiff should make his election to dissolve his attachment, or consent to try, in an issue between him and the creditors, the question whether his suit and attachment were collusive. The plaintiff elected the latter, and an issue was formed for the purpose, between the plaintiff and the creditors, and tried by a jury, who found that the suit was prosecuted collusively, for the purpose of defrauding creditors. The court then ordered all further proceedings to be stayed; from which order the plaintiff appealed to the Superior Court. That court, in sustaining the appeal, differed from the court below only as to the *manner* of arriving at the result; and held, that if the creditors should give security to pay all the costs which the plaintiff might recover, they would be permitted to defend *in the name of the defendant.*[3] Afterwards the same court referred to this as a very common practice, and as in general the only mode in which a fraudulent attachment could be defeated;[4] and in a subsequent case held it

[1] Harrison *v.* Pender, Busbee, 78; Bank of Fayetteville *v.* Spurling, 7 Jones, 398.

[2] Whipple *v.* Cass, 8 Iowa, 126.

[3] Buckman *v.* Buckman, 4 New Hamp. 319.

[4] Webster *v.* Harper, 7 New Hamp. 594; Pike *v.* Pike, 4 Foster, 384.

to be available, as well in cases of garnishment, as in those of levy on specific property.[1] It was also held by that court, that a subsequent attacher might move to dismiss a prior attachment, on the ground that there was no such person as the plaintiff therein.[2] The same court allowed a subsequent attacher, moving to dismiss a prior attachment, to take advantage of a material alteration of the writ in that case, made *after* its service.[3]

In South Carolina, by the proceeding in attachment, the funds of the absent debtor are brought into court, and distributed among the several attaching creditors; and a judgment in attachment serves no other purpose than to ascertain the amount of the plaintiff's claim on the attached property, by establishing his demand against the absent debtor; and no execution can be issued on the judgment. When the attached fund is distributed the judgment is *functus officio*, unless the defendant shall have entered special bail, or, under the act of 1843, executed a warrant of attorney and been admitted to defend the action, on the conditions prescribed by the act.[4] There it is settled, that in making the distribution of the moneys arising from the attachments, the court can and should inquire into the several causes of action, and may inspect its judgments to prevent fraud and injustice. In effecting this, the consent or opposition of the parties to the judgment is disregarded, for they may combine to effect the fraud. The acquiescence of the defendant in the plaintiff's illegal proceedings affords no protection against an inquiry into the judgment, when that is necessary for the protection of the rights of other creditors. Therefore, where an attachment appears to have issued on a debt not due, it will be set aside in favor of a junior attachment upon a debt due.[5] The same position is taken in California,[6] Mississippi,[7] and Indiana.[8]

[1] Blaisdell *v.* Ladd, 14 New Hamp. 129. See Harding *v.* Harding, 25 Vermont, 487, for the practice in such cases, as regulated by statute in Vermont.

[2] Kimball *v.* Wellington, 20 New Hamp. 439.

[3] Clough *v.* Curtis, 62 New Hamp. 409.

[4] Walker *v.* Roberts, 4 Richardson, 561.

[5] Walker *v.* Roberts, 4 Richardson, 561; Ralph *v.* Nolan, 1 Rice's Digest of S. C. Reports, 77. The Supreme Court of Connecticut, however, in a case which came before it between conflicting attaching creditors, where the claim of one was resisted by the others, because it embraced, besides a debt actually due, an amount intended to cover and secure a liability which the plaintiff was under as an indorser for the accommodation of the defendant, decided that, in the absence of fraud, such a combination of claims did not make the attachment void, and that the attachment should be sustained as to the debt really due, but not as to the rest. Ayres *v.* Husted, 15 Conn. 504.

[6] Patrick *v.* Montader, 13 California, 434; Davis *v.* Eppinger, 18 Ibid. 378.

[7] Henderson *v.* Thornton, 37 Mississippi, 448.

[8] United States Express Co. *v.* Lucas,

But, of course, this is not the case in any State whose statutes authorize a suit by attachment to be brought on a debt not due.[1]

The Court of Appeals of Virginia took the same salutary course, holding that a junior attaching creditor may come in and defend against a senior attachment, by showing that the debt for which the senior attachment was taken out had been paid.[2]

In Georgia, this subject received a full examination, and it was held, on general principles, and without any statutory aid, that a judgment in an attachment suit may be set aside, in a court of law, upon an issue suggesting fraud and want of consideration in it, tendered by a junior attaching creditor of the common defendant.[3]

In Texas, it is well settled that a junior attaching creditor cannot intervene in the suit of a previous attacher for the purpose of defeating his attachment on the ground of informalities or irregularities therein; but may do so to show that the prior attachment was based on a fraudulent demand, or one having no existence, or that the grounds upon which the prior writ was sued out did not exist, and that the affidavit made for obtaining it was known by the party making it or by the plaintiff, to be false; and it is held there, that an attachment based on a claim in part real and in part fictitious is wholly invalid as against other attachers.[4]

In New York, A. issued an attachment, and caused it to be levied on property of B., owned by him and a partner, not a defendant in that action, constituting the firm of B. & Co. Thereupon B. requested D., a creditor of the firm, to accept a confession of judgment from himself and copartner, and levy on the attached property, thus gaining a prior right over A. This judgment was set aside by the court, as being intended to defraud creditors. Thereupon D. issued an attachment on the partnership debt, and levied it on the property already attached; having done which, he took no further step in the action for more than four months; thus leaving his attachment dormant, and apparently to be used only against other creditors. After the levy of D.'s attachment, he went on selling goods to B. & Co.,

36 Indiana, 361; Lytle v. Lytle, 37 Ibid. 281.

[1] Espenhain v. Meyer, 74 Wisconsin, 379.

[2] McCluny v. Jackson, 6 Grattan, 96.

[3] Smith v. Gettinger, 3 Georgia, 140.

[4] Nenny v. Schluter, 62 Texas, 327; Grabenheimer v. Rindskoff, 64 Ibid. 49; Johnson v. Heidenheimer, 65 Ibid. 263; Freiberg v. Freiberg, 74 Ibid. 122; Bateman v. Ramsey, Ibid. 589.

and required and obtained security on those sales. These facts, taken in connection with the design of the previous confession of judgment, were held sufficient to justify the inference that D.'s attachment was levied, not to secure the debt due him, but to hinder and delay the collection of A.'s demand, and that D.'s attachment would be dropped if A.'s claim were out of the way; and the court, acting on this inference, on motion vacated D.'s attachment.[1]

In New York, also, prior to the enactment of the provision of the Code of Civil Procedure authorizing a subsequent attacher to move to set aside a previous attachment, that right existed as to jurisdictional defects in the prior attachment; and that provision was held not to confer any new right, but to be simply declaratory of existing law.[2]

In Tennessee, in a contest in chancery between creditors of a common debtor, it was held, that an attachment by one might be assailed by the others for a fatal defect in his proceedings, whether it appeared on their face, or was shown by proof *aliunde*.[3]

In Michigan, where a plaintiff took judgment for the demand upon which his attachment was obtained, and also for another demand which became due after his suit was instituted; the judgment was held fraudulent as against, and was postponed to the claim of, a subsequent attaching creditor.[4]

In Ohio, the right of a subsequent attacher to object to a prior attachment on the ground that the cause of action therein is one for which an attachment is not allowed by law, was recognized; but the court seemed to consider that this right could not be exercised until the question of the final disposition of the attached fund among the attachers, after all had obtained judgments, should come before the court.[5] Afterwards, in an action between different attaching creditors, to determine priorities among them, the attachment which had been first served was set aside as against subsequent attachers, because under the code of that State it was issued before a petition in the action was filed; when the code required a civil action to be commenced by filing in the clerk's office a petition, and authorized an attachment to issue "*at or after* the commencement" thereof.[6]

In Wisconsin, an attachment was set aside, on the motion of

[1] Reed *v.* Ennis, 4 Abbott Pract. 393.
[2] Jacobs *v.* Hogan, 85 New York, 243.
[3] Bank of Rome *v.* Haselton, 15 Lea, 216.
[4] Hale *v.* Chandler, 3 Michigan, 531.
[5] Ward *v.* Howard, 12 Ohio State, 158.
[6] Seibert *v.* Switzer, 35 Ohio State, 661.

subsequent attachers, on the ground that the cause of action on which it was issued, and the affidavit for obtaining the attachment, were such as did not, under the statute, authorize the issue of the writ.[1]

In Alabama, a junior attacher cannot claim the proceeds of the sale of attached property as against a prior attachment unless that attachment be void.[2]

These cases, proceeding upon principles of strict right and justice, and fulfilling the law's aversion to every species of collusion and fraud, it is to be hoped will be regarded as authority in all other courts, and lead to the general adoption of a practice which thus summarily assails an evil that cannot be so effectively reached by any other means.

§ 275 *a*. When a junior attaching creditor seeks to vacate a prior attachment, there must be sufficient proof that he has acquired a valid lien on the same property covered by the prior attachment. Until this fact is established by legal evidence he is a mere stranger, having no right to intervene.[3]

§ 276. Besides the remedy afforded in the mode pointed out in the preceding section, there is no doubt that an attaching creditor, injured by a fraudulent attachment, may maintain an action for the injury, either against the plaintiff therein, or the officer who made it with knowledge of its fraudulent character. Thus, where officer A., on Saturday afternoon, attached goods in a store, and removed part of them to another building, and then closed and locked the store, and took the key away; and early on Monday morning officer B. called on the defendant with another attachment, and the defendant showed him the goods, and B. thereupon attached them, knowing the existence of A.'s attachment; and A. sued B., in trover, for the value of the goods; it was held, that B.'s attaching the goods with the defendant's assistance showed collusion to defeat the first attachment, and that fraud was a necessary inference from the facts, and that the action was maintainable.[4]

Of the same character is the following case: A. & B., separate creditors of C., sued out attachments against him, and levied

[1] Hawes *v.* Clement, 64 Wisconsin, 152.

[2] Alexander *v.* King, 87 Alabama, 642.

[3] Tim *v.* Smith, 65 Howard Pract. 199; 93 New York, 87; Knudson *v.* M. & C. F. Co., 1 Howard Pract. N. S. 152; Williams *v.* Waddell, 5 New York Civil Procedure, 191.

[4] Denny *v.* Warren, 16 Mass. 420.

them on his property. Afterwards D. obtained an attachment against C., and the officer returned a levy on the same property, subject to the attachments of A. & B. Afterwards A. & B. were desirous that the property should be sold on their writs, but D. gave written notice to the officer that he should resist the demands upon which the attachments of A. & B. were founded, as being fraudulent, and that he should object to the sale of the goods until judgment should be recovered in due course of law, and the goods be sold on execution, and that if the officer should sell the goods on the writs, it would be at his peril. The officer, notwithstanding, sold the property, and when A. & B. obtained judgments, appropriated the proceeds to the satisfaction thereof, leaving nothing to satisfy D.'s claim; whereupon D. brought an action on the case against the officer for failing to satisfy his execution. On the trial it appeared, that in the action instituted by A. there were two demands, one of which was just, the other without any consideration and fraudulent. It was held, that embracing this fraudulent demand in the suit made the whole action void as to D.'s right as an attaching creditor, and that the officer was liable to D.[1]

§ 277. An action on the case for conspiracy also lies in favor of a creditor, against his debtor and a third person, who have procured the property of the debtor to be attached in a suit for a fictitious debt, and applied to the payment of the judgment obtained in the action, in order to prevent creditors from obtaining payment out of the property; the creditor having subsequently attached the same goods, and not being able to procure payment of his debt, in consequence of the prior attachment; and the debtor being insolvent.[2]

§ 278. In a statutory proceeding in Massachusetts, taken by an attaching creditor, to avoid, as fraudulent, a previous attachment, an important question arose, in connection with the admissibility in evidence, on behalf of the first attacher, of the declarations of the defendant, made after the suit of the first attacher was brought, that his demand was *bona fide* and for a valuable consideration. Such declarations were held to be admissible.[3] And it was afterward held, that such admissions, made after the subsequent attacher was admitted to defend the

[1] Fairfield *v.* Baldwin, 12 Pick. 388.

[2] Adams *v.* Paige, 7 Pick. 542; Zadick *v.* Schafer, 77 Texas, 501.

[3] Strong *v.* Wheeler, 5 Pick. 410.

previous suit, were equally admissible in evidence for the first attacher.[1]

It is different, however, in regard to giving in evidence declarations of the first attaching creditor, in a proceeding taken by a subsequent attacher to defeat his attachment. There they are considered entirely inadmissible.[2]

§ 279. In Massachusetts, the statute authorizing proceedings of this description formerly provided that any subsequent attaching creditor of the same property which was attached by a prior attacher, might be admitted to defend the first suit, in like manner as a party sued could or might have done; and it was held, that in order to entitle a subsequent attacher to this privilege, it was not necessary that his suit should have been instituted in the same court as the first.[3] In a proceeding taken under that statute, the subsequent attacher offered to prove that a portion of the note on which the first suit was founded was not due to the plaintiff; but it was objected that the subsequent attacher could make no defence which the defendant could not himself make; and that the defendant could not make such a defence; but the court considered that position untenable.[4]

§ 280. The difficulties attending the practical operation of the Massachusetts statute, authorizing a subsequent attacher to make *any defence* to a previous attachment which the defendant might make, led to the substitution for it of another provision, to the effect that any person claiming title or interest in the attached property, might be allowed to dispute the validity and effect of the prior attachment, on the ground that the sum demanded therein was not justly due, or that it was not payable, when the action was commenced. Under this statute this case arose. A. made out and signed a note to B., without B.'s knowledge, and caused an attachment to be made thereon; which B. assented to, and ratified afterwards, but not until a second attachment had been made by C.; who contested the validity of A.'s attachment, on the ground that the note sued on was not a debt due to B. at the time of the attachment. The court sustained this position, because — among other reasons — the note did not constitute an express promise until assented to by B.[5] But where a debt was

[1] Lambert *v.* Craig, 12 Pick. 199.
[2] Carter *v.* Gregory, 8 Pick. 165.
[3] Lodge *v.* Lodge, 5 Mason, 407.
[4] Carter *v.* Gregory, 8 Pick. 165.
[5] Baird *v.* Williams, 19 Pick. 381. In Swift *v.* Crocker, 21 Pick. 241, the attachment was sued out and in part executed before the note was signed, and was dissolved by a subsequent attacher.

due and payable when an attachment was taken out, and the attachment was contested by a subsequent attacher, on the ground that it was obtained by the order and direction of the defendant, and that the assent of the creditor was not given until after the subsequent attachment had been levied; the court held, that under the statute in question, the subsequent attacher had no right to make the question, because the facts did not show that the debt was not justly due and owing, or that it was not payable, when the suit was brought.[1]

§ 281. Whether, if a debtor himself cause an attachment to issue, and to be executed on his property in favor of his creditor, without the knowledge of the latter, a subsequent attacher can take advantage of that fact to dissolve the attachment, does not seem to have been directly decided; but in Massachusetts a case very nearly of that description was presented, where a debtor, at the time when his debt was incurred, promised to secure his creditor in case of difficulty; but the manner in which this was to be done was not agreed upon; and the debtor afterward, being in failing circumstances, caused his own property to be attached on behalf of the creditor, but without his knowledge; and the creditor, before he was informed of the attachment, had said, that if the debtor did not secure him, he was a rascal. The court held, that the agreement to secure the creditor was tantamount to the creation of an agency in the debtor, which authorized him to cause the attachment; or if not, that the attachment was ratified by the creditor; and in either case it was valid against subsequent attaching creditors.[2]

§ 282. There are other cases in which attachments will be held to be dissolved, by the acts of the plaintiff, as to subsequent attaching creditors. Each attacher has a right to the surplus of the defendant's property, after satisfying the previous attachments; and any act of an attaching creditor, after the institution of his suit, altering his writ, or changing or increasing the demand upon which he attached, is, in effect, a fraud upon the subsequent attachers, and is regarded as dissolving his attachment so far as they are concerned.

In the matter of an alteration of the writ, it has been held, that an attachment is dissolved, as between creditors, by amending the writ, under leave of court, by striking out the name of one of two defendants, so that the action stands as against the

[1] Baird v. Williams, 19 Pick. 381.

[2] Bayley v. Bryant, 24 Pick. 198.

other defendant only.[1] So, too, by changing the place to which the writ is made returnable.[2]

In the case of changing or increasing the demand upon which the attachment was obtained, the filing of a new count to the declaration, which does not appear by the record to be for the same cause of action as that originally sued on, will dissolve the attachment. A case of this description first came up in Massachusetts, upon the following facts. The first attacher's writ contained two counts, the first, upon a promissory note for $171.82, the second for $2000, money had and received. While the action was pending, the plaintiff added three counts; the first for $322, the balance of an account annexed, in which the charges were principally for labor, articles sold and delivered, and money paid; the second, on a promissory note for $96; and the third, on a promissory note for $500. Upon this state of facts a controversy arose between this plaintiff and a subsequent attacher, each claiming the proceeds of the property attached. The court declared the first attachment dissolved, and used the following language: "We think that after an attachment, or holding to bail, the plaintiff cannot alter his writ to the injury of a subsequent attaching creditor, or of bail. The subsequently attaching creditor has a vested right to the excess beyond the amount of the judgment to be rendered upon the writ of the first attaching creditor, as it was when served. So, bail are not to be made liable for a greater sum than was included in the writ at the time when they entered into the bail-bond. It is said that the second count would cover the additional counts; but it cannot be ascertained from the record that it was intended to cover them."[3] The same court held the same views, in a subsequent case, where the declaration contained a count for money had and received, and a count for goods sold and delivered; and the plaintiff, in the progress of the suit, under a leave to amend, filed nine new counts, on notes, checks, and for money lent, &c. The court there say: "The claim or cause of action, for the security of which a creditor obtains his lien by attachment, should be clearly indicated in the writ and declaration. The declaration should set forth clearly the cause or causes of action to be secured by the attachment. And it would be a manifest injustice to a subsequently attaching creditor, to permit the prior

[1] Peck v. Sill, 3 Conn. 157.

[2] Burrows v. Stoddard, 3 Conn. 431; Starr v. Lyon, 5 Ibid. 538.

[3] Willis v. Crooker, 1 Pick. 204; Freeman v. Creech, 112 Mass. 180. See Young v. Broadbent, 23 Iowa, 539; Wood v. Denny, 7 Gray, 540.

attacher to amend, by the introduction of claims which were not originally set forth and relied upon in the declaration; for he has a vested interest in the surplus. The rights of the attaching creditors should be ascertained as they existed and were disclosed by the writ and declaration, at the time when they made their attachments. If it were otherwise, the attachment law might be made a most powerful engine of fraud, that would work up the whole of the debtor's property for the use of the first attacher who should think proper to enlarge his claims sufficiently to embrace it."[1] So, where a defendant in an attachment suffered default, and the plaintiff took judgment for the whole claim in suit, without deducting therefrom the amount of certain articles received by him from the defendant in part payment of the claim; it was held, that his attachment was thereby vacated as to subsequent attaching creditors.[2] So, where, by agreement between the plaintiff and the defendant, judgment was taken for claims which were not recoverable under any count in the declaration, it was held to be a fraud which dissolved the attachment as against a subsequent attacher.[3]

§ 282 *a*. The doctrines stated in the next preceding section were applied in Colorado, in a case where, pending the attachment, the defendant sold real estate upon which the attachment had been levied, and after the sale, the plaintiff, with knowledge thereof, amended his proceedings, and took judgment by confes-

[1] Fairfield *v.* Baldwin, 12 Pick. 388; Lutterloh *v.* McIlhenny Co., 74 Texas, 73; Parks *v.* Young, 75 Ibid. 278.

[2] Peirce *v.* Partridge, 3 Metcalf, 44.

[3] Page *v.* Jewett, 46 New Hamp. 441. In this case the court, after a review of the authorities in that and other States, thus sums up the doctrine on this subject: "So, if a prior attaching creditor takes his judgment for a larger amount than he could properly have done under his declaration, either in consequence of adding amendments for new causes of action or without such amendments, or if he take judgment for a claim larger than was due at the time the writ was made and served, or on any other claim than that which was intended to be included in the suit at the time of the attachment, even though the *ad damnum* in the writ, and the counts in the original declaration were large enough to have covered them; and should seek to collect this whole amount of his debtor; this would be doing a wrong to the rights of subsequent attaching creditors, which vitiates his attachment, as against such creditors, unless it be shown affirmatively that the error was the result of mere mistake or accident; in which last case the whole judgment will not be held void as to subsequent attaching creditors; but in the absence of such affirmative proof of mistake, &c., the wrong done to subsequent attaching creditors, or attempted or intended to be done, the law pronounces a fraud upon them, and visits the fraud with its ordinary penalty; it makes the judgment into which the fraud enters void as to those injured or intended to be injured by the fraud, and the attachments are so far vitiated."

sion for more than double the amount for which the attachment was levied on the real estate, and under execution on that judgment the real estate was sold. The purchasers of the real estate from the defendant filed a bill in chancery to set aside the sale, and release and discharge the lien of the judgment; and the bill was sustained, upon the ground that the lien of the attachment was lost, as against subsequent purchasers from the defendant, by the increase of the plaintiff's demand, with notice of the previous sale by the defendants.[1] But, on appeal, this decision was reversed, and the bill dismissed, by the Supreme Court of the United States, on the ground that the complainants in the bill were not creditors, but purchasers *pendente lite*, and therefore as conclusively bound by the results of the litigation, whatever they might be, as if they had been parties to it from the outset.[2]

§ 282 *b*. In the case referred to in the next preceding section, it will be observed that the purchasers of the real estate must, when they made the purchase, have known that the attachment had been levied on it, and therefore they were bound by the results of the litigation. But where one, in good faith and for a valuable consideration, purchased a money claim in favor of *Jonathan* C. D. against A., not knowing that before the purchase A. had been summoned as garnishee of *John* C. D., in another State; and, *after* his purchase, the proceedings in the attachment suit were amended by inserting the name of Jonathan for John; it was held, that the amendment could not affect his interest under the assignment of the claim, and that, as against him, the attachment was by the amendment dissolved.[3]

[1] Tilton *v.* Cofield, 2 Colorado, 392.

[2] Cofield *v.* Tilton, 93 United States, 163. The court said: "The appellees [complainants] voluntarily took the position they occupy. They chose to buy a large amount of property, including that in controversy, from the fugitive debtor. This was done after the latter had been seized under the writ of attachment, and while the suit in which it was issued was still pending. They took the title subject to the contingencies of the amendments that were made, and of everything else, not *coram non judice*, the court might see fit to do in the case. The attachment might be discharged or the judgment might be larger than was then anticipated. They took the chances and must abide the result. Having obtruded themselves upon the property attached, they insist that their purchase narrowed the rights of the plaintiffs, and circumscribed the jurisdiction of the court. Such is not the law. After their purchase, the court, the parties, and the *res* stood in all respects as they stood before; and the judgment, sale, and conveyance have exactly the same effect as if the appellees and the facts upon which they rely had no existence."

[3] Moore *v.* Graham, 58 Michigan, 25.

§ 283. Where the parties, during the pendency of a suit by attachment, made a settlement of all their accounts, by which a balance was found due to the plaintiff, for which judgment was entered in his favor by consent; and the settlement included some demands for which the writ contained no proper counts, and some which were not payable till after the action was commenced; it was held, that the attachment was dissolved *in toto*, as to subsequent attaching creditors.[1]

§ 284. A very strong case was where, by a slip of the pen, in making out the writ, the command to the officer was to attach to the value of *six dollars* only, while the cause of action set forth, and the judgment afterwards recovered, were for more than *four hundred* dollars. With the consent of the defendant, the writ was amended by inserting the word *hundred* after the work *six*; and yet it was decided, that a subsequent attacher was not affected by the amendment, and that he might maintain an action against the officer for applying the attached property in full satisfaction of the previous attachment; there not being sufficient to satisfy both.[2]

§ 285. But where an attorney, inadvertently, and without the knowledge of his client, took a judgment and obtained execution for a sum known by his client to be more than was really due him, and on discovering his mistake, went to the officer holding the execution and stated the sum that was actually due the plaintiff, and that he had come to give instructions relative to the service of the execution; it was held, that, as there was no fraudulent intent, but a mere mistake, the attachment was not thereby dissolved.[3] And so, a mere amendment of the declaration, by which the amount to be recovered is not increased, and no new cause of action is introduced, will not vacate an attachment. If, for example, there are money counts only in the declaration, which refer to a bill of particulars annexed, containing a description of bills of exchange, notes, &c., which are to be offered in evidence; counts subsequently added, technically describing those bills, notes, &c., would not be considered as new causes of action, but as entirely consistent with the intent

[1] Clark *v.* Foxcroft, 7 Maine, 348; Fairbanks *v.* Stanley, 18 Ibid. 296.

[2] Putnam *v.* Hall, 3 Pick. 445; Danielson *v.* Andrews, 1 Ibid. 156.

[3] Felton *v.* Wadsworth, 7 Cushing, 537. See, in the opinion of the court, the remarks upon the cases of Fairfield *v.* Baldwin, and Pierce *v.* Partridge. See Laighton *v.* Lord, 9 Foster, 237; Page *v.* Jewett, 46 New Hamp. 441; Mendes *v.* Freiters, 16 Nevada, 388.

of the plaintiff, as originally manifested in his writ and declaration. If, however, such an intent cannot be inferred from the writ and declaration, the new counts will be considered to be for other than the causes originally set forth.[1] So, where a plaintiff, by an amendment of his declaration, increased the amount declared on in the writ, and the amount of the *ad damnum*, and obtained judgment for a sum larger than could have been recovered under the original writ; but when execution was issued, instructed the officer holding it to levy on the property only to the extent of the amount claimed in the original writ; thus showing that there was no intent to prejudice or injure subsequent attachers; it was held that the attachment was not dissolved.[2]

§ 286. But where a declaration contains the money counts, how is it to be determined what demands were put in suit, and what were afterwards introduced? The rule seems to be, that those which the plaintiff owned when the suit was brought, and which were due and payable, and liable to be introduced without amendments, and which were so introduced, and judgment obtained upon them, cannot, in the absence of contradictory proof, be regarded as not in suit; for instance, none of the cases decide that an attachment would be dissolved, by proving a promissory note under a money count originally contained in the declaration.[3]

§ 287. As before stated,[4] a mere amendment of a declaration, by which the amount to be recovered is not increased, and no new cause of action is introduced, will not dissolve an attachment; nor will an amendment of the given name of the plaintiff,[5] or of one of two defendants;[6] nor will an amendment by striking out the middle initial letter in the name of the defendant;[7] nor will an amendment of a writ against W. R., by inserting the words, "otherwise called W. J. R."[8] But the introduction of new defendants into the writ after the levy of it will have that effect. Thus, where partnership property was attached, upon a writ containing the names of three only out of four partners, and the next day the name of the fourth was inserted, and a new at-

[1] Fairfield *v.* Baldwin, 12 Pick. 388; Miller *v.* Clark, 8 Ibid. 412; Ball *v.* Claflin, 5 Ibid. 303; Laighton *v.* Lord, 9 Foster, 237; McCarn *v.* Rivers, 7 Iowa, 404; Austin *v.* Burlington, 34 Vermont, 506.

[2] Cutler *v.* Lang, 30 Federal Reporter, 173.

[3] Fairbanks *v.* Stanley, 18 Maine, 296.

[4] *Ante*, § 285.

[5] Cain *v.* Rockwell, 132 Mass. 193; Wight *v.* Hale, 2 Cushing, 486.

[6] West *v.* Platt, 116 Mass. 308.

[7] Diettrich *v.* Wolffson, 136 Mass. 335.

[8] Wentworth *v.* Sawyer, 76 Maine, 434.

tachment made upon the same property; but in the mean time another creditor had attached the property, upon a writ against the four partners; it was decided, that the first attachment was vacated as against the second.[1] Much more will an attachment be dissolved by the substitution of another defendant for the one against whom it issued.[2]

§ 288. Another act of a plaintiff by which, as to subsequent attachers, it is said his attachment will be dissolved, is the referring of the action, and *all demands between the plaintiff and defendant*, to arbitration; unless it be shown that the reference covered only the demands sued upon. The Supreme Court of Maine carried the doctrine a step further, and held, that it makes no difference whether any new demand beyond the original cause of action is introduced, or if introduced, whether it is allowed, or not. The mere act of referring, where the rule of reference is carried into effect, is considered to dissolve the attachment; on the principle, that, for the sake of a general settlement with his adversary, or for any other reason satisfactory to himself, the plaintiff consents to waive and does waive the security he holds under his attachment. And the court say, "Unless such a principle should be adhered to, a plaintiff's demand might be essentially increased, by the introduction of new causes of action, and in this manner a second attaching creditor might lose the benefit of his attachment, and though with no immoral motive on the part of the plaintiff, such second creditor would be, in legal contemplation, defrauded of his rights."[3]

The better rule, however, seems to be that adopted in Massachusetts, where, though it was at first held that the mere fact of entering into such a reference dissolves the attachment,[4] in a subsequent case that decision was limited, and it was determined that, if it be shown that no new demand was admitted by the referees, the attachment will not be dissolved.[5]

§ 289. Fraudulent attachments will also be overturned, when brought in conflict with the rights of third persons, other than attaching creditors. Thus, where A., being desirous of purchasing certain mortgaged land, paid the mortgagee the value of his interest therein, and the mortgagee reconveyed to the mortgagor,

[1] Denny v. Ward, 3 Pick. 199.
[2] Milledgeville Man. Co. v. Rives, 44 Georgia, 479.
[3] Clark v. Foxcroft, 7 Maine, 348. See Mooney v. Kavanaugh, 4 Maine, 277.
[4] Hill v. Hunnewell, 1 Pick. 192.
[5] Seeley v. Brown, 14 Pick. 177.

to enable him to give a deed of the whole estate to A., but immediately afterwards, and before the deed to A. was executed, attached the land in a suit against the mortgagor, the attachment was declared fraudulent and void as against A.[1]

A case involving similar principles came up in Vermont, under a petition to foreclose a mortgage. A. and B. were creditors of C., who had engaged to give A. security for his debt by a mortgage on lands. On a certain day, finding himself in failing circumstances, C. applied to B. and stated to him his pledge to A., and requested B. to prepare a note and a mortgage to A. to secure the payment of the note; at the same time disclosing to B. his situation, and pointing out to him property to a large amount, which he requested B. to attach for his own security. To this arrangement B. made no objection, and C. executed the note and mortgage and took them away, and the mortgage was lodged for record early the next morning. In the mean time, B. sued out attachments against C., and attached the premises embraced in the mortgage, together with the other property designated by C. The controversy was between A., claiming the property under the mortgage, and B., claiming it under the attachment. It was held, that the attempt by B. to defeat the arrangement he had previously acquiesced in, was inconsistent with good faith, and surreptitious, and that the mortgage should be preferred to the attachment.[2]

In New Hampshire was a similar case. A. had mortgaged certain real estate, apparently for its full value. B. and C. being both creditors of A., B. informs C. that he proposes to procure an arrangement by which that mortgage shall be removed and one taken to himself, and C. advises him to effect the arrangement, which is at once proceeded with. Before the necessary writings are prepared, and while they are in progress, C. causes an attachment to be made of the land; which does not become known to B. and the other parties, until their agreement was completed and the deeds recorded. B. then filed his bill in equity, setting forth the facts, and praying that C. might be enjoined against claiming anything in the land contrary to the title of the plaintiff under the mortgage, and that the attachment might be postponed to the mortgage. The court, considering the attachment under such circumstances to operate as a direct fraud upon B., granted the decree according to the prayer of the bill.[3]

[1] Spear v. Hubbard, 4 Pick. 143.
[2] Temple v. Hooker, 6 Vermont, 240.
[3] Buswell v. Davis, 10 New Hamp. 413.

So, where a conveyance had been made of certain lands, on the 7th of May, and before it could be properly recorded, one attached the lands to secure a note signed by the grantors on the 8th of May, and payable in thirty days, but which was antedated, as the third of April preceding, being the time when the goods which formed the consideration of it had been sold on a credit of six months; it was held, that the antedating the note, and creating a present debt, on which the attachment of the lands was made, was a fraud on the grantees, and did not disturb their rights under the conveyance, whatever might be the validity of the proceedings as between the parties.[1]

[1] Briggs *v.* French, 2 Sumner, 251.

CHAPTER XII.

CUSTODY OF ATTACHED PROPERTY.

§ 290. WHEN an officer levies an attachment on personal property, he becomes liable therefor at the termination of the suit; on the one hand, for its production to satisfy the plaintiff's execution, if obtained; on the other, for its return to the defendant, if the suit fails, or the attachment be otherwise dissolved. Hence, the first duty of the officer is to retain possession of the property. If he do not, he will be regarded as having abandoned the attachment; and its lien, as to subsequent attachers, or *bona fide* purchasers from the defendant, will be lost.[1] He has no authority to deliver the attached property to the plaintiff.[2] But if the plaintiff consent that the property pass out of the officer's possession, the defendant cannot take advantage of that fact to dissolve the attachment. Thus, where a steamboat was attached, but, by agreement between the plaintiff and the master of the boat, was allowed to proceed on its voyage, with the understanding that on its return it should be delivered to the sheriff, subject to the writ; it was held that, as between the parties to the action, the lien of the attachment was not extinguished.[3]

§ 291. In view of this liability, it is necessary that the officer should sustain such a relation to personal property which he has seized, as will enable him to hold it. To this end, he is, by the levy of the attachment and the reduction of the property into his possession, vested with a special property in the latter, which enables him to protect the rights he has acquired;[4] and

[1] Nichols *v.* Patten, 18 Maine, 231; Waterhouse *v.* Smith, 22 Ibid. 337; Thompson *v.* Baker, 74 Ibid. 48; Baldwin *v.* Jackson, 12 Mass. 131; Boynton *v.* Warren, 99 Ibid. 172; Sanderson *v.* Edwards, 16 Pick. 144; Bruce *v.* Holden, 21 Ibid. 187; Taintor *v.* Williams, 7 Conn. 271; Pomroy *v.* Kingsley, 1 Tyler, 294; Fitch *v.* Rogers, 7 Vermont, 403; Sanford *v.* Boring, 12 California, 539; Chadbourne *v.* Sumner, 16 New Hamp. 129.

[2] Vanneter *v.* Crossman, 39 Michigan, 310.

[3] Conn *v.* Caldwell, 6 Illinois (1 Gilman), 531. See Fifield *v.* Wooster, 21 Vermont, 215.

[4] *Post*, § 371; Barker *v.* Miller, 6 John-

this property constitutes an insurable interest, which he may protect by obtaining insurance thereon; though he is not under obligation to do so.[1]

This special property of the officer continues so long as he remains liable for the attached effects, either to have them forthcoming to satisfy the plaintiff's demand, or to return them to the owner, upon the attachment being dissolved; but no longer.[2] For any violation of his possession, while his liability for the property continues, he may maintain trover,[3] trespass,[4] or replevin;[5] and in any such action the defendant cannot set up as a defence any informality or irregularity in the attachment suit.[6] And the officer alone can maintain any such action; it cannot be maintained by the attachment plaintiff.[7] If the officer die before action brought in his favor against a trespasser, his administrator may maintain trover, for the benefit of the attaching creditor.[8] And if the conversion took place while the officer who attached the property remained in office, his subsequent resignation of his office will not deprive him of his right of action.[9] In order to maintain his special property, and to entitle himself to the continued protection of the law, the officer must, in his proceedings with the property subsequent to the attachment, comply with all the requirements of the law, or show some legal excuse for not doing so; and if he does not, he becomes liable, not only to those on whose behalf he acts, but also to the owner of the property, and those claiming under him and standing in his situation.[10] Thus, if he sell the property without lawful authority, he is counted a trespasser *ab initio;* and the

son, 195; Hotchkiss *v.* McVickar, 12 Ibid. 403; Wilbraham *v.* Snow, 2 Saunders, 47; Ladd *v.* North, 2 Mass. 514; Gibbs *v.* Chase, 10 Ibid. 125; Whittier *v.* Smith, 11 Ibid. 211; Poole *v.* Symonds, 1 New Hamp. 289; Huntington *v.* Blaisdell, 2 Ibid. 317; Odiorne *v.* Colley, Ibid. 66; Lathrop *v.* Blake, 3 Foster, 46; Nichols *v.* Valentine, 36 Maine, 322; Stiles *v.* Davis, 1 Black, 101; Foulks *v.* Pegg, 6 Nevada, 136; Braley *v.* French, 28 Vermont, 546.

[1] White *v.* Madison, 26 Howard Pract. 481.

[2] Collins *v.* Smith, 16 Vermont, 9; Gates *v.* Gates, 15 Mass. 310; Holt *v.* Burbank, 47 New Hamp. 164; Wentworth *v.* Sawyer, 76 Maine, 434.

[3] Ludden *v.* Leavitt, 9 Mass. 104; Badlam *v.* Tucker, 1 Pick. 389; Lowry *v.* Walker, 5 Vermont, 181; Lathrop *v.* Blake, 3 Foster, 46.

[4] Brownell *v.* Manchester, 1 Pick. 232; Badlam *v.* Tucker, Ibid. 389; Walker *v.* Foxcroft, 2 Maine, 270; Strout *v.* Bradbury, 5 Ibid. 313; Whitney *v.* Ladd, 10 Vermont, 165.

[5] Perley *v.* Foster, 9 Mass. 112; Gordon *v.* Jenney, 16 Ibid. 465; Carroll *v.* Frank, 28 Missouri Appeal, 69.

[6] Marshall *v.* Marshall, 2 Houston, 125.

[7] Skinner *v.* Stuart, 39 Barbour, 206; Schaeffer *v.* Marienthal, 17 Ohio State, 183.

[8] Hall *v* Walbridge, 2 Aikens, 215.

[9] Polley *v.* Lenox Iron Works, 4 Allen, 329

[10] Jordan *v.* Gallup, 16 Conn. 536.

pendency of the action in which the attachment was made is no obstacle to an immediate suit by the owner.[1]

§ 292. To what degree of care and diligence in the keeping of attached property is an officer to be held? This question received a careful and elaborate consideration by the Supreme Court of Vermont; which is referred to here, rather than in another place, because it was raised in connection with the officer's liability to the plaintiff in attachment, for not having property forthcoming on execution. Certain cattle were attached, and the officer, being sued for failing to have them forthcoming, to be sold on execution, offered testimony to show that when they were attached, he delivered them for safe keeping to one A.; that the plaintiff's agent, who ordered the attachment made, was present and made no objection; that A. put the cattle into a pasture, with a good and sufficient fence; and in a few days after, the defendant, the owner of the cattle, without the knowledge or consent of the officer, or of A., took down the fence of the pasture, drove the cattle out, and put them in his own pasture, and gave such notice that other creditors attached and held the cattle. This testimony was rejected by the court, and the matter came up on the propriety of the rejection. The Supreme Court, after examining the cases cited in support of the plaintiff's action, and discussing the subject at large, held the conclusion, that an officer attaching personal property on *mesne* process should only be liable to the same extent as bailees for hire; and though liable to produce the attached property on execution, he may excuse himself by showing that it is not in his power, and that he has been guilty of no fault.[2] The same doctrine is held in New Hampshire, Massachusetts, Tennessee, and Iowa.[3]

If, however, goods which an officer has attached be afterwards levied on by another officer and taken with a force which the former is not at the time able to resist, such levy and dispossession will not relieve him from responsibility for the goods, if he fail to institute an action for their recovery, or to organize a sufficient force to retake them.[4]

[1] Ross *v.* Philbrick, 39 Maine, 29; Culver *v.* Rumsey, 7 Bradwell, 422; Zschocke *v.* The People, 62 Illinois, 127.

[2] Bridges *v.* Perry, 14 Vermont, 262; Smith *v.* Church, 27 Ibid. 168; Briggs *v.* Taylor, 28 Vermont, 180. See Moore *v.* Westervelt, 1 Bosworth, 357.

[3] Kendall *v.* Morse, 43 New Hamp. 553; Parrott *v.* Dearborn, 104 Mass. 104; Snell *v.* The State, 2 Swan, 344; Cresswell *v.* Burt, 61 Iowa, 590.

[4] Wood *v.* Bodine, 39 New York Supreme Ct. 354.

§ 292 *a*. It is of special importance that an officer should not leave attached property in the possession of the defendant, unless authorized thereto by some statutory provision. The possession of personal property is the only *indicium* of ownership; and to suffer a debtor to retain possession of his property after it has been attached is *prima facie* evidence that the attachment is fraudulent in respect to other creditors; whose attachments, or a *bona fide* purchase from the defendant, will prevail against the attachment whose lien has thus been lost.[1] And in such case it has been held, that the officer has not even constructive possession of the property.[2] Hence, he cannot, consistently with the preservation of his lien, constitute as his agent to keep the property, either the defendant,[3] or a servant of the defendant, who continues in the defendant's employ.[4] But though the lien will be lost by suffering the property to go back into the possession of the debtor, that result will not be produced by the defendant or his family being allowed, without interfering with the officer's possession, to use such articles as will not be injured by such use. Therefore, where attached effects were left in the house inhabited by the defendant, in the charge of a keeper appointed by the officer, and the keeper suffered the defendant's family to use them, the court, finding that the use was permitted from motives of humanity and compassion, and not with a design to cover the property against creditors by a pretended attachment, held that the attachment was not thereby dissolved.[5] Nor will the lien be lost by the officer's employing the wife of the defendant as keeper of the property, where the law authorizes a married woman "to carry on any trade or business, and perform any labor or services on her sole and separate account."[6]

§ 292 *b*. Where an officer leaves attached goods in the possession of the defendant, or has unauthorizedly ceased to retain possession of them, and another officer attempts to attach them, notice to him of the first attachment will not prevent his acquiring a lien on them; for, though an attachment may have been

[1] Gower *v.* Stevens, 19 Maine, 92; Dunklee *v.* Fales, 5 New Hamp. 527; Pomroy *v.* Kingsley, 1 Tyler, 294; Taintor *v.* Williams, 7 Conn. 271; Baker *v.* Warren, 6 Gray, 527; Flanagan *v.* Wood, 33 Vermont, 332; Root *v.* Railroad Co., 45 Ohio State, 222.

[2] Knap *v.* Sprague, 9 Mass. 258; Pillsbury *v.* Small, 19 Maine, 435.

[3] Gower *v.* Stevens, 19 Maine, 92.

[4] Russell *v.* Major, 29 Missouri Appeal, 167.

[5] Baldwin *v.* Jackson, 12 Mass. 131. See Train *v.* Wellington, Ibid. 495; Young *v.* Walker, 12 New Hamp. 502.

[6] Farrington *v.* Edgerley, 13 Allen, 453.

made, yet the second officer may justly assume it to have been abandoned, when the possession of the first officer was relinquished.[1] But if the second officer know that there is a subsisting attachment, and an unrescinded contract of bailment, although the defendant might at the time have possession of the property, he cannot acquire a lien by attaching it.[2]

§ 292 *c*. If an officer suffer articles he has attached to be mixed with other articles of a like kind, which had been previously attached by another officer, who returns an attachment by himself of the whole, the special property of the officer who permitted the intermixture is lost, and the other officer is entitled to hold the articles.[3]

§ 292 *d*. What effect upon an attachment has the removal of the attached property, by the officer, beyond his bailiwick, into a foreign jurisdiction? It seems clear that the mere fact of such removal, without regard to the circumstances connected with it, will not dissolve the attachment. In determining its effect, therefore, regard must be had to the object and manner of the removal. The first point to be determined is, whether the purpose of the officer in the removal was a lawful one; and next whether his possession of the property, personally, or by another, was continued. If the purpose was lawful and the possession continued, the attachment would not be dissolved. But if the purpose was unlawful, though his possession remained, or if lawful, and he lost his possession, his special property in the goods would be devested. Thus, where an officer attached certain sheep in Massachusetts, and delivered them to a keeper in Rhode Island, taking his obligation to re-deliver them on demand; it was held, that the officer's special property was not thereby determined.[4] Here, the purpose was entirely lawful, and the possession of the keeper was that of the officer.

But where a sheriff attached certain cotton at Vicksburg, Mississippi, and without authority of law or of the parties to the suit, shipped it to a commission merchant in New Orleans, with instructions to sell it at private sale, and remit the proceeds to him; and the proceeds were attached in the hands of the mer-

[1] Bagley *v.* White, 4 Pick. 395; Sanderson *v.* Edwards, 16 Ibid. 144; Gower *v.* Stevens, 19 Maine, 92; Young *v.* Walker, 12 New Hamp. 502; Flanagan *v.* Wood, 33 Vermont, 332.

[2] Young *v.* Walker, 12 New Hamp. 502.

[3] Gordon *v.* Jenney, 16 Mass. 465.

[4] Brownell *v.* Manchester, 1 Pick. 232.

chant by another creditor of the defendant, and the Vicksburg sheriff claimed them; it was held, that the officer had violated his official duty in sending the cotton to New Orleans, and that his special property in it was lost.[1]

§ 292 *e*. The doctrines thus far stated apply to the acts of the officer himself. We come now to a class of cases which, for convenience, require a separate notice, as involving the results of acts done by parties other than the officer, though the general principles are, on the whole, similar. It is customary, and often necessary, for an attaching officer to place attached property, for safe keeping, in charge of a servant appointed by himself, whose possession is his possession. In such case the lien of the attachment is in no sense lost by the officer's possession ceasing to be personal. But if the servant placed in charge of the property abandon it, and it come into the possession of an adverse claimant,[2] or be attached by another officer,[3] the lien of the first attachment will be lost.

In such cases, what act, what species of possession, and what degree of vigilance, will constitute legal custody, is often a question of difficulty, depending upon a variety of circumstances, having respect to the nature and situation of the property, and the purposes for which custody and vigilance are required; such as protection from depredation by thieves, preservation from the weather and other causes of damage, and especially giving notice to other officers, and to all persons having conflicting claims.[4]

Where wood and lumber lying on a wharf were attached, and placed by the officer in charge of a keeper, and on a Sunday morning the keeper went away from the wharf, and returned in the afternoon, having in the mean time secured the property in the manner usual on Sundays, by locking the gates of the wharf and taking the key with him; it was held that there was no neglect on the part of the keeper, that his custody was still legal, and that the attachment was not abandoned.[5] So, where an attachment was levied on a parcel of hewn stones lying scattered about on the ground, which were placed by the officer in charge of the plaintiff, whose place of business was about fifty or sixty rods from the place where the stones lay, and in sight of them, and whose boarding-house was also in sight of them;

[1] Dick *v.* Bailey, 2 Louisiana Annual, 974.

[2] Carrington *v.* Smith, 8 Pick. 419.

[3] Sanderson *v.* Edwards, 16 Pick. 144.

[4] Sanderson *v.* Edwards, 16 Pick. 144.

[5] Fettyplace *v.* Dutch, 13 Pick. 388.

it was held, that the officer remained in the constructive possession of them. The court said: "It is not necessary, to continue an attachment, that an officer or his agent should remain constantly in the actual possession. The nature of the possession and custody which an officer is to keep, will depend upon the nature and position of the property, as ships, rafts, piles of lumber, masses of stone, or lighter or more portable or more valuable goods. In general it may be said that it shall be such a custody as to enable an officer to retain and assert his power and control over the property, so that it cannot probably be withdrawn, or taken by another without his knowing it. Here, it is manifest the officer did not intend to abandon the attachment, and that the measures he took, considering the bulky nature of the property, and the situation in which it was placed, were sufficient to continue his possession and preserve his attachment."[1]

§ 293. As previously stated,[2] the officer must comply with all the requirements of the law, or show some legal excuse for not doing so. We will, therefore, consider what will, and what will not, excuse an officer, for not having attached property forthcoming on the execution.

§ 294. *Of sufficient excuse.* There can be no doubt that an officer may excuse his failure to have property in hand to answer the execution, by showing that, though attached as the property of the defendant, it was, in fact, not his. Whether, if this fact was known to him when he levied the attachment, and he, notwithstanding, made the levy, and returned the property as attached, he could afterwards excuse himself on that ground, is questionable;[3] but where, at the time of the levy, he believes the property to be the defendant's, and takes it as such, and it turns out afterwards that it was not, and he fails to have it ready to meet the execution, he can certainly escape liability by proving the fact to have been so.[4] So, if an officer attach property of the defendant, which is by law exempt from attachment, he cannot be held responsible for its non-delivery on execution,

[1] Hemmenway *v.* Wheeler, 14 Pick. 408. See Commonwealth *v.* Brigham, 123 Mass. 248.

[2] *Ante*, § 291.

[3] French *v.* Stanley, 21 Maine, 512.

[4] Fuller *v.* Holden, 4 Mass. 498; Tyler *v.* Ulmer, 12 Ibid. 163; Denny *v.* Willard, 11 Pick. 519; Canada *v.* Southwick, 16 Ibid. 556; Dewey *v.* Field, 4 Metcalf, 381; Jordan *v.* Gallup, 16 Conn. 536; Cilley *v.* Jenness, 2 New Hamp. 87; French *v.* Stanley, 21 Maine, 512; Chapman *v.* Smith, 16 Howard Sup. Ct. 114; Magne *v.* Seymour, 5 Wendell, 309; Mason *v.* Watts, 7 Alabama, 703; State *v.* Ogle, 2 Houston, 371.

unless it was attached with the consent of the defendant.[1] So, if he attach property which is *in custodia legis*, and therefore not attachable, he is not liable for failing to have it forthcoming on execution.[2] And if attached property, of which due care is taken by the officer, be lost by fire or theft, the officer is not liable for the loss; otherwise, however, if it be burned or stolen while he omits due care to prevent such loss.[3]

§ 295. *Of insufficient excuse.* An officer cannot protect himself from his obligation to have the property forthcoming on execution, by making return that he attached it "*at the risk of the plaintiff.*" Such a return could not affect the rights of the creditor, or relieve the officer from any portion of his responsibility.[4]

§ 296. If an officer attach property under an informal writ, and afterwards the writ is altered and made to assume a legal form, and the plaintiff obtain judgment upon it, the subsequent alteration will not excuse the officer from keeping the property safely, that it may be applied to satisfy the plaintiff's judgment, or returned to the defendant, if he should become entitled to it.[5]

§ 296 *a.* In some States, two or more courts of co-ordinate jurisdiction direct their process to the same officer. In such case, if he attach property under a writ issued out of one court, and afterwards attach it again under a writ from another court, the latter court may order the property to be sold, but can only deal with the excess of the proceeds of the sale over the amount of the first attachment. If it assume to apply the proceeds to the second attachment, and the officer submit to its mandate to that end, it will form no excuse for his not having the proceeds forthcoming to satisfy the first attachment.[6]

§ 297. The taking of attached property out of the officer's custody, by a wrong-doer, without any act of abandonment on the part of the officer, will not defeat the attachment;[7] nor will it excuse his failure to have it forthcoming on execution.[8] In such case, he may follow and retake it wherever he may find it,

[1] Cilley *v.* Jenness, 2 New Hamp. 87.
[2] *Ante*, § 251; Hale *v.* Duncan, Brayton, 182.
[3] Dorman *v.* Kane, 5 Allen, 38; Starr *v.* Moore, 3 McLean, 354.
[4] Lovejoy *v.* Hutchins, 28 Maine, 272.
[5] Childs *v.* Ham, 23 Maine, 74.
[6] Weaver *v.* Wood, 49 California, 297.
[7] Harriman *v.* Gray, 108 Mass. 229; Lovell *v.* Sabin, 15 New Hamp. 29.
[8] Lovell *v.* Sabin, 15 New Hamp. 29.

even if taken into another State;[1] and he may maintain an action against the wrong-doer, or against another officer who subsequently attached it.[2] In an action against an officer for such a failure, the property consisted of a quantity of logs, and he offered to prove that the logs were afloat in a body, with a boom around them, on their way from one point to another, and that the current of the water and the power of the wind were so great that the officer, with any force he could command, could not stop the logs in his precinct, and that the parties in possession of them were able to resist, and did successfully resist, his taking or holding possession of the logs, until they had arrived in another county; it was held, that the evidence was rightly rejected; the facts, if true, constituting no defence.[3]

§ 297 *a*. If the officer act under statutory provisions which dispense with his actual custody of the attached property, and, while the property is out of his actual custody, it be wrongfully taken away and sold by the defendant, he cannot be held responsible for not producing it on execution. This was decided in Massachusetts, under a statute in these words: "When an attachment is made of any articles of personal estate, which by reason of their bulk, or other cause, cannot be immediately removed, a copy of the writ and of the return of the attachment may, at any time within three days thereafter, be deposited in the office of the clerk of the town in which it is made, and such attachment shall be equally valid and effectual, as if the articles had been retained in the possession and custody of the officer." The officer attached property which, by reason of its nature and bulk, could not be easily removed, and the defendant, without his knowledge or consent, removed and sold it. There was no proof of negligence or official misconduct on the part of the officer, or that the loss of the property could have been prevented by any care on his part, without retaining the possession. The court said: "The language of the statute is this: 'Such attachment shall be equally valid and effectual, as if the articles had been retained in the possession and custody of the officer.' We think it follows clearly that property thus attached, although a lien is created upon it for the benefit of the creditor, is not to be regarded as in the possession and custody of the officer, and that no such responsibility devolves upon him as if it were. . . . We

[1] Utley *v.* Smith, 7 Vermont, 154; Rhoads *v.* Woods, 41 Barbour, 471.

[2] Butterfield *v.* Clemence, 10 Cushing, 269.

[3] Lovejoy *v.* Hutchins, 23 Maine, 272.

do not mean to imply that the officer might not be responsible for any neglect or misconduct in relation to the property. If there were any collusion with the debtor, wrongful omission to make the attachment known to him, or neglect of interfering to protect the property, when, by a change of circumstances, its removal and reduction into the officer's possession became proper or necessary, the rule might be different. We only decide that the officer is not responsible as if the goods were in his actual custody."[1]

§ 298. The capture by a hostile force of that part of an officer's precinct in which he had attached property, will not excuse him from producing the same on execution, unless the common consequences of a capture, according to the laws of war, should follow; such as restraint upon the persons of the inhabitants captured, which would prevent their removal, and upon their effects, so that they could not be withdrawn from the control of the captors. If the capture is not attended with these effects, there is no reason why the obligation of any citizen, created before the capture, should be destroyed or impaired.[2]

§ 299. The removal of an officer from office, between the time of levying the attachment and that of the issue of execution, will not excuse his failure to produce the property to meet the execution; for his special property remains, to secure the plaintiff in the fruits of his judgment.[3] Nor can he escape liability for such failure, because the execution was delivered to another officer.[4] Nor will he be relieved from his liability for a failure of his deputy to produce attached property to answer the execution, because such failure took place after the latter had ceased to be his deputy.[5]

§ 300. It is no excuse for failing to have property forthcoming, that it was of a perishable nature, and was, therefore, suffered to remain in the defendant's possession. The officer's duty is, whenever its further detention would expose it to ruin, and thus defeat the object of the attachment, to expose it fairly to public sale, and account for only the net proceeds.[6] But to

[1] Hubbell v. Root, 2 Allen, 185.
[2] Congdon v. Cooper, 15 Mass. 10.
[3] Tukey v. Smith, 18 Maine, 125; McKay v. Harrower, 27 Barbour, 463; Lawrence v. Rice, 12 Metcalf, 527; Sagely v. Livermore, 45 California, 613.
[4] Lovell v. Sabin, 15 New Hamp. 29.
[5] Morse v. Betton, 2 New Hamp. 184.
[6] Cilley v. Jenness, 2 New Hamp. 87.

authorize a court to order the sale of such property as perishable, it must appear to be inherently liable to deterioration and decay within an early period. It is not sufficient to show that the keeping of the goods until they can be sold under execution will result in their depreciation in value because of changes in their styles and fashions.[1]

The disposition of attached property, which is perishable in its nature, or the keeping of which would be attended with great expense, is, to a considerable extent, now regulated by statutory provisions, and not left to the discretion of the officer. The court in which the suit is pending is, in many States, authorized to order a sale during the pendency of the suit. In such a case it was held in Missouri, that the power confided to the court was for the benefit of both parties, debtor as well as creditor, the object of the sale being merely to change the form of the property; and that the plaintiff had no right, as in the case of an execution, to order the officer to stop the sale; and, if the officer should neglect to sell as ordered, his responsibility would depend, as in similar cases of disobedience to the proper mandates of the court, upon the validity of the excuse he offers; and the mere order of the plaintiff would constitute none whatever.[2] In the same State it was held, that where attached property is sold under an order of court, because of its perishable nature, the purchaser takes a title that is good against the world; and that claimants of it must look to the proceeds of the sale in asserting their rights.[3]

§ 301. An officer attached a pleasure-carriage and several wagons and sleds, which he left in open fields, where they were allowed to remain several months exposed to the weather. He was sued for neglect in preserving and taking care of the property. At the trial the plaintiff insisted, as a matter of law, that, as the officer had permitted the property to remain exposed to the weather, and unprotected, whereby it had suffered damage and become reduced in value, it constituted such a neglect of duty on the part of the officer as would render him liable. But the court left the question to the jury, to find whether the officer exercised ordinary care and prudence in the custody and preservation of the property attached; and instructed the jury that it was the duty of an officer attaching property to use ordinary care

[1] Fisk v. Spring, 32 New York Supreme Ct. 367; Zimmerman v. Fischer, 13 New York Civil Procedure, 224.

[2] Oeters v. Aehle, 31 Missouri, 389.

[3] Young v. Kellar, 94 Missouri, 581.

and prudence in its custody and preservation; and that ordinary care and prudence was such as men of ordinary care and prudence usually exercise over their own property; and that it was for the jury to say whether it was common or ordinary care and prudence to keep such property as the carriage, wagons, and sleds in question in the manner in which they were kept. This ruling of the court was held by the Supreme Court of Vermont to be erroneous. Said the court, "We do not think a judge is ever bound to submit to a jury questions of fact, resulting uniformly and inevitably from the course of nature, as that such carriages will be injured, more or less, by exposure to the weather during the whole winter; or that a judge is bound to submit to a jury the propriety of such a course, when it is perfectly notorious that all prudent men conduct their own affairs differently. This uniformity of the course of nature or the conduct of business becomes a rule of law. But while there is any uncertainty, it remains matter of fact, for the consideration of a jury. It could not be claimed that it should be submitted to a jury whether cattle should be fed or allowed to drink, or cows be milked." [1]

§ 302. The expense attending the keeping of attached property is no excuse for failing to produce it on execution. Therefore, where an officer had attached certain cattle, and did not have them forthcoming under the execution, and he was sued for his failure in this respect, it was held, that he could not show, either in bar of the action, or in mitigation of damages, that the country was, at the time of the attachment, in an impoverished state as to fodder for cattle, and that had he taken the cattle into possession, and kept them for the execution, the expense would have exceeded the value; and that, in fact, they could not have been kept alive.[2]

§ 303. Where an officer is instructed by the plaintiff's attorney to deliver attached property to a certain person, and take his receipt therefor, and he does so, he cannot be held to produce the property on execution.[3]

§ 304. In an action against an officer for failing to keep attached property, so as to have it on execution, he cannot be per-

[1] Briggs v. Taylor, 28 Vermont, 180.
[2] Tyler v. Ulmer, 12 Mass. 163; Sewall v. Mattoon, 9 Ibid. 535; Newman v. Kane, 9 Nevada, 234.
[3] Rice v. Wilkins, 21 Maine, 558.

mitted to impeach the plaintiff's judgment, except perhaps on the ground of fraud.[1] Nor can he take advantage of the loss of the writ of attachment, the fact of the existence of which may be proved by parol.[2] He may, however, show, in mitigation of damages, that the execution has, since suit brought against him, been satisfied; but the plaintiff will, nevertheless, be entitled to recover nominal damages and costs.[3]

§ 305. In order to fix the officer's liability for attached property, it is necessary that a demand should be made of him upon the execution. If the execution be placed in the hands of the officer who made the attachment, he being still in office, that will be sufficient notice to him that the plaintiff claims to have the attached goods applied to satisfy the execution.[4] Where no place is prescribed by law, at which a demand must be made, it may be at his place of abode, or wherever he may be. If the demand should be made of him at a place where the property is not, and he offers to deliver it to the officer at the place where it is, it will be the duty of the officer to repair to such place to receive it; but if he refuse to deliver it at any place, this refusal will subject him to an action, whether the property was at the place where demanded or not.[5] If the property attached has been sold before judgment and execution, by consent of the parties, or under statutory authority, the officer is bound to keep the proceeds of the sale in his hands to answer the execution, and the delivery of the execution to him authorizes him to apply the money in his hands to its satisfaction.[6]

§ 306. Where the attaching plaintiff has obtained judgment, and the officer who levied the attachment is still in office, the execution should be delivered to him; but if he be no longer in office, should it be delivered to him, or to his successor in office? and what kind of execution should it be? In a case of this description in New York, an ordinary *fieri facias* was directed to the sheriff of the county, and delivered to the successor in office of him who had made the attachment. He demanded the attached property of his predecessor, who failed to deliver it, and the plaintiff in the attachment sued him for this failure. There was

[1] Adams *v.* Balch, 5 Maine, 188; McComb *v.* Reed, 28 California, 281; West *v.* Meserve, 17 New Hamp. 432.

[2] Brown *v.* Richmond, 27 Vermont, 583.

[3] Brown *v.* Richmond, 27 Vermont, 583.

[4] Humphreys *v.* Cobb, 22 Maine, 380.

[5] Scott *v.* Crane, 1 Conn. 255; Dunlap *v.* Hunting, 2 Denio, 643.

[6] Eastman *v.* Eveleth, 4 Metcalf, 137.

no statutory provision directly applicable to such a case, and the court considered the question on principle and by analogy, and came to the conclusion that "the plaintiff was *ahead of his time* in demanding the attached property before he had issued a proper execution;" which would have been a special one against the attached property, and should have been delivered to the person who, as sheriff, had levied the attachment; and not having been delivered to him, he could not be made liable for failing to deliver the property to his successor.[1]

§ 307. While the attachment is pending, can the defendant maintain an action against the officer for damage done to the property through his negligence? In Maine, it was decided that he cannot, because during the pendency of the attachment the officer is liable to the plaintiff therein, whose claim is paramount to that of the defendant, until the attachment is dissolved; and that a right of action does not accrue to the defendant until he is entitled to a return of the property, when he will have a full claim to indemnity.[2] In Vermont, however, the opposite ground was taken, so far as to allow the attachment defendant to sue the officer in such case, pending the attachment; but it was intimated that the attachment plaintiff might show his interest in the recovery, and that the court would thereupon order a stay of execution till the creditor's rights were determined, or might require the money to be paid into court to be held for the benefit of the creditor, if he should finally recover.[3]

§ 308. In an action by the attachment defendant against the officer, for having lost or wasted a portion of the property, the latter may excuse himself from liability by showing that he had applied the amount to the defendant's use, by paying with it the expenses of keeping the property,[4] or by satisfying with it other executions against the defendant.[5]

§ 309. Where an officer fails to keep attached property to answer the execution, there is no reason why he should be subjected to a different rule of damages from that which prevails in actions generally, against officers for neglect or failure of duty; that is, the actual injury sustained by the plaintiff by reason of the neglect or failure. The value of the property attached, if

[1] McKay *v.* Harrower, 27 Barbour, 463.
[2] Bailey *v.* Hall, 16 Maine, 408.
[3] Briggs *v.* Taylor, 35 Vermont, 57.
[4] Twombly *v.* Hunnewell, 2 Maine, 221.
[5] Bennett *v.* Brown, 31 Barbour, 158; 20 New York, 99.

less than the amount of the plaintiff's judgment, or the amount of the latter, where the value of the property is greater, will generally be *prima facie* the measure of damages, subject to be mitigated by evidence produced by the officer.[1] Therefore, where a number of successive attachments were laid on property; and all the plaintiffs except him whose writ was last levied, believing that the property would lessen in value, and that the proper season for selling it would be lost, if it should be kept until final judgment could be obtained, directed the officer to sell it, and hold the proceeds to satisfy the judgments to be recovered, in the order of their respective attachments; and the defendant assented to the sale, which took place; and a greater sum was produced than would have been, if the property had been kept and sold upon execution, but not sufficient to satisfy all the attachments; and the last attacher got nothing, and brought suit against the officer; it was held, that, though he had departed from the line of official duty, and the plaintiff was, therefore, entitled to recover damages, yet, as the plaintiff would have got nothing if the officer had performed his duty, nominal damages only could be recovered.[2] But an officer is not entitled to have a reduction made from the full value of the property, in mitigation of damages, for the expenses which *might* have attended the keeping, had it been kept safely.[3]

§ 310. If an officer state in his return the value of property attached, we have seen that he is *prima facie* bound by it, and the burden is on him to show that the valuation was incorrect.[4] When sued for not having the property forthcoming on execution, if there be no other evidence of value than that furnished by the return, the officer will be concluded by it;[5] and so, it seems, if it should appear that the plaintiff relied upon the return, and was thereby led to abstain from efforts to get further security.[6]

§ 311. As to the matter of expenses attending the keeping of attached property, the general principle is, that where an officer is required to perform a duty involving disbursements of money out of his pocket, he must be reimbursed. When personal prop-

[1] Sedgwick on Damages, 539–543; Kerr v. Drew, 90 Missouri, 147.

[2] Rich v. Bell, 16 Mass. 294.

[3] Lovejoy v. Hutchins, 23 Maine, 272; Tyler v. Ulmer, 12 Mass. 163; Sewall v. Mattoon, 9 Ibid. 535.

[4] *Ante*, § 206.

[5] French v. Stanley, 21 Maine, 512.

[6] Allen v. Doyle, 33 Maine, 420.

erty is attached, it is to be kept by the officer at the expense of the defendant. If the defendant be unwilling to incur this expense, he must replevy it, or procure it to be receipted. If the officer afterwards receives an execution, he sells the property, and out of the proceeds takes his pay for the expense of keeping, and applies the remainder on the execution.[1] Thus the defendant pays for the keeping. If the defendant settles the debt with the plaintiff, so that no execution comes into the officer's hands, on which to make a sale, the officer may sustain an action against the defendant for the expense of the keeping;[2] but he has no such lien on the property as will enable him, under such circumstances, to hold it for the payment of such expense.[3] If the property be sold by the officer, and thereafter the defendant satisfy the attachments, that will not deprive the officer of the right of retaining, out of the money in his hands, the expense of keeping.[4] If there should be a judgment for the defendant, or the suit be dismissed, the plaintiff will be liable for the expenses.[5] It was held in Vermont, that if the officer use the property — as, for instance, a horse — sufficiently to pay for its keeping, he cannot make the plaintiff pay for such keeping.[6]

§ 311 *a*. If an officer levy an attachment on an establishment where business is carried on, he has no authority, because of the writ in his hands, to keep the establishment open for customers, or to conduct business therein; and he cannot hold the attachment plaintiff for the expenses of carrying on the business, even though his attorney authorized him to carry it on; if the attorney had no express power to authorize it.[7]

§ 311 *b*. An attaching officer is not entitled to compensation beyond his statutory fees and salary for his mere personal care of attached property, even though the plaintiff's attorney consent to his having it.[8] If he has any valid charges as custodian, he should make out his bill of items, and present it to the taxing officer for taxation, or if there are no fees allowed by statute, he

[1] Hanness *v.* Smith, 1 Zabriskie, 495; Dean *v.* Bailey, 12 Vermont, 142; McNeil *v.* Bean, 32 Ibid. 429; City Bank *v.* Tucker, 7 Colorado, 220.

[2] Dean *v.* Bailey, 12 Vermont, 142; Sewall *v.* Mattoon, 9 Mass. 535.

[3] Felker *v.* Emerson, 17 Vermont, 101.

[4] Gleason *v.* Briggs, 28 Vermont, 135.

[5] Phelps *v.* Campbell, 1 Pick. 59; Tarbell *v.* Dickinson, 3 Cushing, 345; City Bank *v.* Tucker, 7 Colorado, 220.

[6] Dean *v.* Bailey, 12 Vermont, 142; *Ante*, § 203.

[7] Alexander *v.* Devereaux, 53 California, 663; 59 Ibid. 476.

[8] King *v.* Shepherd, 68 Iowa, 215; Burk *v.* Webb, 32 Michigan, 173.

should apply to the court for such allowance, upon notice and motion to the parties interested. He has no right arbitrarily to fix his own price, and retain the property or money received on sale of the attached effects. He can only retain as a matter of right the fees allowed by law.[1]

[1] Fletcher v. Morrell, 78 Michigan, 176.

CHAPTER XIII.

BAIL AND DELIVERY BONDS.

§ 312. I. *Bail Bonds.* In many of the States, provisions exist for the dissolution of an attachment, upon the defendant giving bond, with approved security, for the payment of such judgment as may be recovered in the attachment suit. This is, in effect, merely Special Bail, and was so regarded in Mississippi, where it was held, that the abolishment by law of imprisonment and bail for debt abolished the right to take such a bond in an attachment suit.[1] In some States, as under the custom of London, the defendant is not allowed to plead to the action until he has given such a bond; but generally he may appear without it.

§ 312 *a*. A bond of this description is wholly void as a statutory obligation, if given to dissolve an attachment that was unlawfully issued, and it is not binding as a common-law bond.[2] The same result follows if such a bond be given in a case in which no attachment was issued.[3]

§ 313. It is the defendant's right to give this bond at any time before judgment, as well where his effects are reached by garnishment, as where levied on and taken into the officer's possession.[4] This right is a privilege accorded by law to, and not a duty enjoined upon, the defendant, and the plaintiff cannot complain if it be not exercised.[5] And it is his privilege alone; unless the statute authorize such bond to be given by a third party.[6]

§ 313 *a*. To uphold such a bond, as against the sureties, it is not necessary to insert therein any consideration, or, in an ac-

[1] Garrett *v.* Tinnen, 7 Howard (Mi.), 465. See Childress *v.* Fowler, 9 Arkansas, 159; Gillaspie *v.* Clark, 1 Tennessee, 2.

[2] Pacific Nat. Bk. *v.* Mixter, 124 U. S. 721.

[3] Williams *v.* Skipwith, 34 Arkansas, 529.

[4] Lecesne *v.* Cottin, 10 Martin, 174.

[5] Watson *v.* Kennedy, 8 Louisiana Annual, 280; Clark *v.* Wilson, 14 Rhode Island, 13.

[6] Kling *v.* Childs, 30 Minnesota, 366.

tion on the bond, to prove any. It is a statutory obligation for which no consideration is necessary.[1]

§ 313 *b*. In some States this bond is made in favor of the officer who executes the attachment. In the United States District Court for Wisconsin, under a statute of that State adopted by that court, a bond was given to the marshal or his successor in office; and the Supreme Court of the United States held, that it might be sued on, either by the marshal to whom it was given, after he had ceased to be marshal, or by his successor in office.[2]

§ 314. In taking this bond the officer is not to be regarded as the agent of the plaintiff, so as to render the plaintiff responsible for his neglect of duty. Therefore where the officer, without levying the attachment, suffered the defendant, without the plaintiff's knowledge, to execute a bond, with surety, to pay the debt; which was considered not to be in conformity to the statute governing the case; the court regarded the officer as rather the agent of the obligors in the bond, and held that the plaintiff was entitled to his recourse on the bond as a good common-law bond, and that the obligors, if injured by the act of the officer, should look to him for redress.[3]

§ 314 *a*. If the terms of the bond be in substantial compliance with the statute, it is sufficient, where the statute does not prescribe the form of the instrument.[4]

§ 315. Where an attachment issues against two joint debtors, and their joint and separate effects are attached, it was held that one of them could not appear and give bail to discharge his separate effects, unless bail and appearance were entered for both.[5]

§ 316. If the statute requires more than one surety, and only one is given, the obligors, when sued on the bond, cannot object to its validity, on that account; for the plurality of sureties is for the benefit of the creditor, and he may dispense with more than one, without invalidating the instrument.[6]

[1] Bildersee *v.* Aden, 62 Barbour, 175; 12 Abbott Pract. N. S. 324.

[2] Huff *v.* Hutchinson, 14 Howard Sup. Ct. 586.

[3] Cook *v.* Boyd, 16 B. Monroe, 556.

[4] Curiac *v.* Packard, 29 California, 194.

[5] Magee *v.* Callan, 4 Cranch, C. C. 251.

[6] Ward *v.* Whitney, 3 Sandford, Sup. Ct. 399; 4 Selden, 442.

§ 316 *a*. If there be no statute authorizing it, the court has no power to order new sureties to be given in such a bond, on the ground that those first taken have become insolvent. The law is complied with by the giving of the bond, without reference to the subsequent ability of the sureties to respond to its obligation.[1]

§ 316 *b*. Where the execution of such a bond was resorted to to discharge a garnishee, and afterwards, while the suit was pending, the defendant and the surety in the bond both became insolvent, and the plaintiff obtained a second attachment in the suit, and summoned the garnishee again; the second garnishment was sustained.[2]

§ 317. In Pennsylvania, Ohio, Kentucky, Illinois, Mississippi, Arkansas, Texas, and Oregon, from the time of the execution of the bond, the cause ceases to be one of attachment, and proceeds as if it had been instituted by summons;[3] and in South Carolina and Georgia, where the statute does not declare that the execution of the bond shall have the effect of dissolving the attachment, it is held, nevertheless, that it has that effect.[4] In Louisiana, a defendant executing the statutory obligation, with surety, to satisfy such judgment as may be rendered against him, is liable to a judgment *in personam*, whether he was served with process or not.[5]

But under some attachment systems this bond may be given by third persons, without the joinder of the defendant with them; and in such case their execution of the bond is neither in fact nor in law an appearance by the defendant to the action, nor does it authorize the supposition that he had any knowledge or notice of it, or any opportunity to appear and defend it.[6]

§ 318. In Mississippi, the court considered that the execution of the bond released any technical objections to the preliminary

[1] Dudley *v.* Goodrich, 16 Howard Pract. 189; Hartford Quarry Co. *v.* Pendleton, 4 Abbott Pract. 460.

[2] Stewart *v.* Dobbs, 39 Georgia, 82.

[3] Fitch *v.* Ross, 4 Sergeant & Rawle, 557; Albany City Ins. Co. *v.* Whitney, 70 Penn. State, 248; Parker *v.* Farr, 2 Browne, 331; Myers *v.* Smith, 29 Ohio State, 120; Harper *v.* Bell, 2 Bibb, 221; People *v.* Cameron, 7 Illinois (2 Gilman) 468; Hill *v.* Harding, 93 Ibid. 77; Philips *v.* Hines, 33 Mississippi, 163; Morrison *v.* Alphin, 23 Arkansas, 136; Shirley *v.* Byrnes, 34 Texas, 625; Bunneman *v.* Wagner, 16 Oregon, 433.

[4] Fife *v.* Clarke, 3 McCord, 347; Reynolds *v.* Jordan, 19 Georgia, 436. See McMillan *v.* Dana, 18 California, 339.

[5] Rathbone *v.* Ship London, 6 Louisiana Annual, 439; Kendall *v.* Brown, 7 Ibid. 668; Love *v.* Voorhies, 13 Ibid. 549.

[6] Clark *v.* Bryan, 16 Maryland, 171.

proceedings;[1] while by the Supreme Court of the United States, and those of Missouri and Wisconsin, it was held, that thereafter the defendant could not take any exception to the attachment, or to the regularity of the proceedings under it;[2] and by that of Illinois, that he could not plead in abatement traversing the grounds of attachment alleged in the affidavit.[3] In Louisiana, however, a different rule prevails. There, when property is seized under an attachment, and the defendant is not served with process, the court is required to appoint an attorney to represent him; and it is admissible for the attorney so appointed, to show that the property attached was not the defendant's, and that, therefore, the court had no jurisdiction of the action.[4] Afterwards, it was decided that the defendant himself, after giving bond, might contest the truth of the allegation on which the attachment issued, in order to procure the dissolution of the attachment; and this expressly on the ground that it was necessary to relieve himself and his surety from the obligation of the bond.[5] And the court further decided that the obligors in a bond of this description, *to which the attachment defendant was not a party*, might, when sued upon it, set up as a defence, that the property was not the defendant's, and that he had not been served with process, and that therefore, the judgment against him was a nullity.[6] In Arkansas, the execution of the bond does not preclude the defendant from interposing pleas in abatement founded on irregularities in the proceedings.[7] And the Circuit Court of the United States for the Eastern District of Arkansas held, that the execution by an attachment defendant of a bond conditioned to "perform the judgment of the court," did not estop him from traversing the affidavit on which the attachment was issued, and defending against the attachment in every respect as if such bond had not

[1] Wharton *v.* Conger, 9 Smedes & Marshall, 510.

[2] Barry *v.* Foyles, 1 Peters, 311; Huff *v.* Hutchinson, 14 Howard Sup. Ct. 586; Payne *v.* Snell, 3 Missouri, 409; Dierolf *v.* Winterfield, 24 Wisconsin, 143; Pacific Nat. B'k *v.* Mixter, 124 U. S. 721; Wolf *v.* Cook, 40 Federal Reporter, 432.

[3] Hill *v.* Harding, 93 Illinois, 77.

[4] Schlater *v.* Broaddus, 3 Martin, N. S. 321; Oliver *v.* Gwin, 17 Louisiana, 28.

[5] Paihles *v.* Roux, 14 Louisiana, 82; Myers *v.* Perry, 1 Louisiana Annual, 372; Kendall *v.* Brown, 7 Ibid. 668. See Bates *v.* Killian, 17 South Carolina, 553.

[6] Quine *v.* Mayes, 2 Robinson (La.), 510; Bauer *v.* Antoine, 22 Louisiana Annual, 145; Edwards *v.* Prather, Ibid. 334.

[7] Childress *v.* Fowler, 9 Arkansas, 159; Delano *v.* Kennedy, 5 Ibid. 457. In Ferguson *v.* Glidewell, 48 Arkansas, 195, the Supreme Court of Arkansas changed its ground, and ruled that the surety in a bond given in an attachment suit, to the effect that the defendant would perform the judgment of the court, was absolutely liable for the amount recovered by the plaintiff, without reference to whether the attachment was rightfully or wrongfully sued out.

been executed, and the property had remained in the hands of the officer; and that if the attachment is not sustained, the plaintiff, though he recover judgment for his debt, cannot resort to the bond to compel payment of the judgment.[1]

§ 319. In New York, a similar view was entertained, in an action on a bond, conditioned to pay the plaintiff in the attachment the amount justly due and owing to him by the defendant, at the time the plaintiff became an attaching creditor, on account of any debt claimed and sworn to by the plaintiff, with interests, costs, etc. The action was against the surety in the bond, and the declaration set forth the affidavit on which the attachment issued, the issuing of the writ, the attachment defendant's application to the judge to discharge the warrant, and that, for the purpose of procuring such discharge, the bond sued on was executed; and concluded with an averment of the indebtedness of the attachment defendant to the plaintiff. The question presented was, whether the affidavits on which the attachment issued were sufficient to authorize the issuing of the writ. It was decided that they were not, and therefore, that the proceedings in the attachment were void; and such being the case, that the bond was also void.[2]

This case was under the Revised Statutes of New York, where the affidavit for an attachment was the foundation of the jurisdiction; and the impeachment of its sufficiency assailed the jurisdiction of the court in the attachment suit. The decision was, that, as there was no jurisdiction of the suit, the bond could not be enforced.

But where, as under the New York Code of Procedure, the attachment is not process by which the suit is commenced, but merely a provisional remedy, it was held, that the statements in the affidavit on which it issued are not jurisdictional facts; that the attachment is not void if those statements are insufficient; and that therefore the sufficiency and truth of those statements cannot be inquired into in an action on a bond given to secure the payment of such judgment as might be recovered in the action in which the attachment was issued.[3] Much less can the attachment defendant, in an action on such bond, object to the regularity of the proceedings in the attachment suit;[4] or

[1] Lehman v. Berdin, 5 Dillon, 340.

[2] Cadwell v. Colgate, 7 Barbour, 253. See Egan v. Lumsden, 2 Disney, 168; Bildersee v. Aden, 62 Barbour, 175.

[3] Cruyt v. Phillips, 16 Howard Pract. 120.

[4] Dunn v. Crocker, 22 Indiana, 324.

to the regularity or merits of the judgment against the defendant; or to an amendment of the complaint by introducing an additional defendant.[1]

In California, in an action on such a bond, no proof is necessary of the preliminary proceedings connected with or preceding the levy; for the admission of the levy, contained in the bond, is enough.[2]

§ 320. But in a suit on such a bond, is the plaintiff bound, as was done in the case just cited, to show in his declaration, or otherwise, the facts necessary to give jurisdiction to the officer who issued the attachment, or that the case was one in which an attachment might be issued according to the statute? This question was passed upon by the New York Court for the Correction of Errors, in the negative. Chancellor WALWORTH, in delivering his opinion, which was almost unanimously sustained by the court, said: "I am not aware of any principle of the common law which requires the obligee in such a bond, when he brings a suit thereon against the obligors, to do anything more in his declaration than to state the giving of the bond by the defendants, and to assign proper breaches of the condition to show that the bond has become forfeited; and to enable the jury to assess the damages upon such breaches, as required by the statute relative to suits upon bonds other than for the payment of money. And where the execution of the bond is admitted or proved upon the trial, and the breach of the condition thereof is also proved, the *onus* of establishing the fact that the bond was improperly obtained, by coercion or otherwise, as by an illegal and unauthorized imprisonment of the defendants, or in consequence of an illegal detention of their goods under color of an attachment granted by an officer who had no authority to issue the same, is necessarily thrown upon them."[3]

§ 321. In Louisiana, after the giving of such a bond, the property attached is no longer under the control of the court. There, cotton was attached, and released on a bond being given; and afterwards a third party intervened and claimed the cotton to be his; but the court refused to hear evidence or entertain the intervention. The Supreme Court sustained this decision, holding the property to be no longer under the control of the court;

[1] Christal *v.* Kelly, 31 New York Supreme Ct. 155.

[2] McMillan *v.* Dana, 18 California, 339.

[3] Kanouse *v.* Dormedy, 3 Denio, 567.

that the bond was a substitute for the property; and that the intervenor must look to the property itself.[1]

§ 321 *a*. The execution of such a bond, and its acceptance by the proper officer, entitles the defendant to an immediate surrender to him of the attached property; but this does not require the officer to return the property to the place whence he removed it.[2]

§ 322. Such bond is available to the plaintiff only, for the satisfaction of such judgment as he may obtain against the defendant; whether in the court in which the suit is brought or in an appellate court.[3] If he fail to obtain a judgment, the bond is discharged. Third parties claiming the attached property can have no recourse upon the bond, there being no privity between them and the obligors.[4] And the judgment obtained against the defendant, *where he is not a party to the bond*, must be a valid judgment, in order to sustain an action on the bond. If the judgment be taken without any jurisdiction in the court, no action can be maintained on the bond for its satisfaction.[5]

§ 322 *a*. In order to a recovery upon such a bond it is not necessary that the judgment against the defendant in the attachment suit should express that it is with privilege on the property attached. The obligors undertake to pay *any* judgment which may be recovered against the defendant; and as the execution of the bond authorizes a personal judgment against him, it is not requisite that the judgment should make reference to the attachment, in order to give a right of action on the bond.[6]

§ 322 *b*. If a bond be given with condition in the alternative, for the payment of the debt, or for the value of the property, the sureties are not entitled to have a judgment upon the bond restricted to the value of the property, but they must pay the debt, interest, and costs.[7] And where the bond stated that it might be satisfied by production of the property, or in case that should not be done, then that it might be satisfied by payment of the

[1] Dorr *v.* Kershaw, 18 Louisiana, 57; Beal *v.* Alexander, 1 Robinson (La.), 277; Benton *v.* Roberts, 2 Louisiana Annual, 243; McRae *v.* Austin, 9 Ibid. 360. See Monroe *v.* Cutter, 9 Dana, 93; McMillan *v.* Dana, 18 California, 339.

[2] Clark *v.* Wilson, 14 Rhode Island, 18.

[3] Washer *v.* Campbell, 40 Kansas, 398.

[4] Dorr *v.* Kershaw, 18 Louisiana, 57; Beal *v.* Alexander, 7 Robinson (La.), 349.

[5] Clark *v.* Bryan, 16 Maryland, 171.

[6] Love *v.* Voorhies, 13 Louisiana Annual, 549.

[7] Bond *v.* Greenwold, 4 Heiskell, 453; Barry *v.* Frayser, 10 Ibid. 206.

judgment; and the obligors declined to do either of those things, but offered to pay the value of the property; it was held, that they were bound to pay the judgment.[1]

§ 323. The obligation of the bond cannot be discharged by a surrender of the property attached.[2] Nor can the obligors, when sued thereon, defend themselves by showing that no attachment was issued;[3] or that the property was not the defendant's when it was attached;[4] or that it was not subject to attachment;[5] or that no property was attached;[6] or that the grounds for obtaining the attachment were insufficient;[7] or that the complaint in the attachment suit was insufficient to sustain the judgment;[8] or that the judgment against the defendant was erroneous;[9] or that the sureties were induced to execute it by fraud of their principal, unless the attachment plaintiff be connected with the fraud.[10] Nor are they discharged by the arrest and commitment of the defendant under a *ca. sa.* issued by the plaintiff, in the same action, after the condition of the bond is broken;[11] nor by the death of the defendant.[12] Nor can they object to the amount of the judgment recovered in the original suit.[13] Nor will it avail them as a defence, that, after judgment and execution were obtained against the defendant, they pointed out to the plaintiff property of the defendant, out of which he could make his claim, and at the same time tendered him money to defray the expenses and charges of the proceeding.[14] Where obligors in such a bond were sued thereon, and defended themselves upon the ground that an appeal had been *prayed* and *allowed* from the

[1] Goebel *v.* Stevenson, 35 Michigan, 172.

[2] Dorr *v.* Kershaw, 18 Louisiana, 57.

[3] Coleman *v.* Bean, 32 Howard Pract. 370; 14 Abbott Pract. 38; 1 Abbott Ct. of Appeals, 394.

[4] Beal *v.* Alexander, 1 Robinson (La.), 277; Hazelrigg *v.* Donaldson, 2 Metcalfe (Ky.), 445. See Bacon *v.* Daniels, 116 Mass. 474; Pacific Nat. Bk. *v.* Mixter, 124 U. S. 721; Birdsall *v.* Wheeler, 58 Conn. 429. In Kentucky it was also held, that after the giving of such a bond no inquiry as to the property attached was pertinent, and therefore a claim of the property by a third party could not be investigated. Taylor *v.* Taylor, 3 Bush, 118.

[5] McMillan *v.* Dana, 18 California, 339; Bacon *v.* Daniels, 116 Mass. 474; Pacific Nat. Bk *v.* Mixter, 124 U. S. 721; Wolf *v.* Cook, 40 Federal Reporter, 432.

[6] Frost *v.* White, 14 Louisiana Annual, 140.

[7] Hazelrigg *v.* Donaldson, 2 Metcalfe (Ky.), 445; Inman *v.* Strattan, 4 Bush, 445; Bildersee *v.* Aden, 62 Barbour, 175.

[8] McCutcheon *v.* Weston, 65 California, 37.

[9] Barry *v.* Frayser, 10 Heiskell, 206.

[10] Coleman *v.* Bean, 14 Abbott Pract. 38; 1 Abbott Ct. of Appeals, 394.

[11] Murray *v.* Shearer, 7 Cushing, 333.

[12] Pacific Nat. B'k *v.* Mixter, 124 U. S. 721.

[13] Morange *v.* Edwards, 1 E. D. Smith, 414.

[14] Hill *v.* Merle, 10 Louisiana, 108.

judgment in the attachment suit, it was held to be no defence, and that it should have been shown that the appeal was *pending* and *undetermined.*[1]

In Georgia, where an attachment was levied on slaves, who were delivered back to the defendant, upon his giving bond, with security, to "pay the said plaintiff the amount of the judgment and costs that he may recover in said case;" and the slaves were afterwards emancipated by the 13th Amendment to the Constitution of the United States; it was held, that the bond was not to deliver the property, but to satisfy the judgment recovered; that the rights of the parties became fixed by the execution of the bond, and the return of the slaves by the sheriff to the defendant; and that their emancipation did not discharge the obligation of the bond.[2]

§ 323 *a*. When a judgment is recovered against the surety in such a bond, he has a right to tender to the plaintiff the full amount of the judgment; and if the plaintiff refuses to receive the same, the surety is discharged from his obligation on the bond.[3]

§ 323 *b*. As a bond of this description is for the payment of such judgment as the plaintiff may recover against the defendant in the attachment suit, if the defendant be discharged in bankruptcy, and plead his discharge before judgment, and thereby no judgment is or can be rendered against him, the sureties in the bond are released from its obligation.[4] But the defendant's bankruptcy *after judgment rendered against him in the attachment suit*, will not have that effect.[5] In New York, the courts refused leave to a defendant to file a supplemental answer setting up his discharge in bankruptcy, because it would deprive the attachment plaintiff of a fair and honest advantage he had obtained by diligent pursuit of legal means and remedies.[6]

§ 323 *c*. The relinquishment by the creditor, without the consent of the surety, of any hold which the creditor has actually acquired on the property of the debtor, operates to discharge the

[1] Poteet *v.* Boyd, 10 Missouri, 160.
[2] Irvin *v.* Howard, 37 Georgia, 18.
[3] Hayes *v.* Josephi, 26 California, 535.
[4] Carpenter *v.* Turrell, 100 Mass. 450; Hamilton *v.* Bryant, 114 Ibid. 543; Payne *v.* Able, 7 Bush, 344.
[5] McCombs *v.* Allen, 25 New York Supreme Ct. 190; affirmed in 82 New York, 114.
[6] Holyoke *v.* Adams, 8 New York Supreme Ct. 223; affirmed in 59 New York, 233.

surety in this description of bond, to the extent of the interest so relinquished.[1]

§ 324. In Arkansas it is held, that the sureties may be sued without issuing execution against the principal. It is sufficient to aver the judgment against him, and its non-payment.[2]

§ 325. Where there are several defendants, and the obligation of the bond is for the payment of any judgment recovered against *them*, it would seem that the sureties could not be made liable for a judgment recovered against them, or a part of them, joined with a new defendant, introduced after the execution of the bond; and it might be doubtful whether they could be charged for a judgment recovered against only a part of the defendants, where the defendants remained the same. But where the obligation is to pay such judgment as the plaintiff may recover *in the suit* in which the bond is given, and on the trial he recovers only against a part of several defendants, and fails to recover against the rest, the sureties are bound for that judgment;[3] but if, by the plaintiff's act, without the assent of the sureties, a change is made in the defendants against whom judgment is obtained, either by discontinuing as to some, and the bringing in of others,[4] or by discontinuing as to some and taking judgment against the rest,[5] the obligation of the sureties is discharged.

§ 325 *a*. On the principle governing in the cases cited in the preceding section, a change in the plaintiffs, without the consent of the sureties in the bond, will discharge the liability of the latter. Thus, where a bond was given in an action in favor of A. as surviving partner, and B. as administrator of the deceased partner, and afterwards the suit was discontinued as to the latter, and an amended complaint in favor of the former alone was filed, under which a judgment was rendered in his favor against the defendant; it was held, that the change in the plaintiffs discharged the obligation of the bond.[6] But under a statute which provided that "an action does not abate by . . . the transfer of any interest, if the cause of action survives or continues," an assignee for the benefit of creditors was consid-

[1] Bedwell *v.* Gephart, 67 Iowa, 44; Sherraden *v.* Parker, 24 Ibid. 28.

[2] Lincoln *v.* Beebe, 11 Arkansas, 697; Chrisman *v.* Rogers, 30 Ibid. 351.

[3] Leonard *v.* Speidel, 104 Mass. 356.

[4] Tucker *v.* White, 5 Allen, 322; Richards *v.* Storer, 114 Mass. 101.

[5] Andre *v.* Fitzhugh, 18 Michigan, 93; Harris *v.* Taylor, 3 Sneed, 536.

[6] Quillen *v.* Arnold, 12 Nevada, 234.

ered entitled to sue on a bond given to the assignor, as plaintiff in the attachment suit, though the bond was, in terms, in favor of the plaintiff only.[1]

§ 326. In Louisiana was a case, not strictly of the nature of those we are now considering, but bearing such resemblance to them as to be fitly noticeable here. A steamboat, owned by several persons, was attached for the debt of one of the owners. The other owners, to relieve the boat from the attachment, came forward and filed their claim for the three-fourths of the vessel, offering at the same time to give security to account for such part as should be found to belong to the defendant upon a final adjustment of their respective claims and accounts, upon a due appraisement and sale of the interest and share of the defendant; and the court ordered the boat to be delivered to them, on their executing bond, with security, "to abide the judgment of the court in the premises." Judgment was rendered against the defendant, only a part of which was satisfied out of the proceeds of the sale of his share in the boat, and the plaintiff sued the parties to the bond to recover the balance. But the court decided, that the bond must be understood in relation to their obligation to account for the share of their co-proprietor; and that, should it remain doubtful, from the manner in which the order of the court and the bond were worded, whether the obligors intended anything more than making themselves responsible for the share of the defendant, justice commanded to put upon the bond the most equitable construction, and to reject an interpretation which would tend to make them pay the defendant's debt, not only out of his share, but out of their own.[2]

§ 327. II. *Delivery Bonds.* This description of instrument is variously styled Delivery, Forthcoming, or Replevy Bond;[3] and on its execution the attaching officer yields the actual possession of the attached property to the principal in the bond; but the

[1] Slosson *v.* Ferguson, 31 Minnesota, 448.

[2] Nancarrow *v.* Young, 6 Martin, 662.

[3] In McRae *v.* McLean, 3 Porter, 138, HITCHCOCK, J., said, in delivering the opinion of the court: "The term *replevy*, in its general sense, includes every return of property levied on, for whatever cause and under whatever conditions the same may be subject to, whether the lien is continued or discharged; and the question of lien or no lien depends more upon the nature of the stipulations entered into in the bond, than upon the particular circumstances which may attend the case. All our injunction and writ of error bonds are replevy bonds; yet there is no lien retained on the property attached, the conditions being to pay and satisfy the judgment or decree of the court whenever made."

property is not withdrawn from the custody of the law, nor is the lien of the attachment lost.[1] It is usually conditioned for the delivery of the property to the officer, either to satisfy the execution which the plaintiff may obtain in the cause, or when and where the court may direct. Sometimes the alternative is embraced, of the delivery of the property *or* the satisfaction of the judgment recovered in the action. Such a bond is no part of the record in a cause, and cannot be looked to, to explain or contradict the sheriff's return.[2]

§ 327 *a*. A bond of this description, given where not authorized by statute, or in terms variant from those prescribed, though not enforceable as a statutory obligation,[3] is not necessarily invalid; it will be good as a common-law bond, where it does not contravene public policy, nor violate a statute.[4] And so, where it is given to the officer who levied the attachment, when the law required it to be given to the attaching plaintiff.[5]

§ 327 *b*. This bond may be taken, as well where the attachment is served only by garnishment, as where tangible property is levied on. It was so held in Iowa, under a statute in these words: "The defendant may at any time before judgment discharge the property attached, or any part thereof, by giving bond, with surety to be approved by the sheriff, in a penalty at least double the value of the property sought to be released, conditioned that such property, or its estimated value, shall be delivered to the sheriff, to satisfy any judgment which may be obtained against the defendant in that suit, within twenty days after the rendition thereof."[6]

§ 328. No set form of words is necessary to make a valid bond of this description. Therefore, where a writing was given, in the nature of a condition to a penal bond, though no bond preceded the condition, it was held to be sufficient, on the following grounds: "It states what act, if performed, shall have the effect

[1] Hagan *v.* Lucas, 10 Peters, 400; Lusk *v.* Ramsay, 3 Munford, 417; Roberts *v.* Dunn, 71 Illinois, 46; Wright *v.* Manns, 111 Indiana, 422.

[2] Kirksey *v.* Bates, 1 Alabama, 303.

[3] Edwards *v.* Pomeroy, 8 Colorado, 254.

[4] Sheppard *v.* Collins, 12 Iowa, 570. See Morse *v.* Hodsden, 5 Mass. 314; Barnes *v.* Webster, 16 Missouri, 258; Waters *v.* Riley, 2 Harris & Gill, 305; Johnson *v.* Weatherwax, 9 Kansas, 75; Whitsett *v.* Womack, 8 Alabama, 466; Palmer *v.* Vance, 13 California, 553; Smith *v.* Fargo, 57 Ibid. 157; Turner *v.* Armstrong, 9 Bradwell, 24; Colorado City Nat. Bank *v.* Lester, 78 Texas, 542.

[5] Agnew *v.* Leath, 63 Alabama, 345.

[6] Woodward *v.* Adams, 9 Iowa, 474.

of rendering the supposed bond void. It implies an agreement on the part of the obligors for the performance of that act. It in effect stipulates that the property attached shall be forthcoming when ordered by the court to be returned to its custody. It shows that a duty had devolved on the persons executing the instrument, and imports an undertaking for the performance of that duty. Although it is unskilfully drawn, and has omitted an essential part of all penal obligations, yet we think an action of covenant can be maintained upon it. Any other construction would violate the obvious intention and understanding of the parties." [1]

§ 329. The addition to the bond of terms not required by law will not vitiate it, nor bar the prescribed remedies on it. Thus, where the statute required a bond "conditioned that the property shall be forthcoming to answer the judgment that may be rendered in the suit;" and the bond given, after reciting the attachment, and that the obligors claimed to be the owners of the property attached, was conditioned that "if the obligors should fail to substantiate their claim and should render up and have forthcoming the property," etc.; it was held, that the addition, "if the obligors should fail to substantiate their claim," did not affect the character of the bond, and that it might be proceeded on in the same manner as if that addition had not been made.[2]

§ 329 *a*. An interlineation in the bond, made after signing by the surety, and without his knowledge or consent, and not made with any wrong or fraudulent intent, but in good faith, and giving no advantage nor working any injury to anybody, will not discharge the surety from liability thereon. Thus, where after the surety signed a delivery bond reciting that the sheriff "did attach the furniture and photographic outfit of" the defendant; and the attachment plaintiff, at the request of the defendant, for the purpose of identifying the property attached, interlined in the bond the words "consisting of six sofa-chairs, one settee, one round table, one clock, one mirror, one showcase, one piece of carpet containing forty-nine yards, twenty large pictures and frames, and one half-size camera;" which was the same property returned by the sheriff as attached; it was held, that the legal effect of the bond was not changed by the interlineation.[3]

[1] Yocum *v.* Barnes, 8 B. Monroe, 496.
[2] Purcell *v.* Steele, 12 Illinois, 93; Sheppard *v.* Collins, 12 Iowa, 570.
[3] Rowley *v.* Jewett, 56 Iowa, 492.

§ 330. This bond differs from the contract of bailment of attached property, prevalent in New England and New York, to be treated of in a subsequent chapter, — 1. In deriving its existence from statute, and not from practice; 2. In being a specialty, instead of a simple contract; 3. In the officer being under legal obligation to release the property from actual custody, upon sufficient security being given; 4. In discharging the officer from liability for the property, at least unless he were guilty of impropriety in taking insufficient security; 5. In being recognized and proceeded upon in the courts as a part of the cause; and 6. In being a contract which the plaintiff may enforce for the satisfaction of his judgment.

§ 331. It differs, too, from a bail bond, in that it does not discharge the lien of the attachment; since the very object of the bond is to insure the safe keeping and faithful return of the property to the officer, if its return should be required.[1] It follows, therefore, that after property is thus bonded, it cannot be seized under another attachment, or under a junior execution, either against the attachment debtor, or against a third person claiming it adversely to the debtor and the creditor; for to hold otherwise would put it in the power of a stranger to the attachment suit, by a levy and sale, to cause a forfeiture of the condition of the bond.[2] And this, too, though the party giving the bond take the property into another State; for he is considered to have a qualified property in the thing, which the courts of every State must respect, wherever acquired.[3]

[1] Gray *v.* Perkins, 12 Smedes & Marshall, 622; McRae *v.* McLean, 3 Porter, 138; Rives *v.* Wilborne, 6 Alabama, 45; Kirk *v.* Morris, 40 Ibid. 225; Woolfolk *v.* Ingram, 53 Ibid. 11; Cordaman *v.* Malone, 63 Ibid. 556; Evans *v.* King, 7 Missouri, 411; Jones *v.* Jones, 38 Ibid. 429; People *v.* Cameron, 7 Illinois (2 Gilman), 468; Gass *v.* Williams, 46 Indiana, 253; Boyd *v.* Buckingham, 10 Humphreys, 434; Allerton *v.* Eldridge, 56 Iowa, 709; Hilton *v.* Ross, 9 Nebraska, 406; Stevenson *v.* Palmer, 14 Colorado, 565. *Sed contra*, Schuyler *v.* Sylvester, 4 Dutcher, 487; Austin *v.* Burgett, 10 Iowa, 302.

[2] *Ante*, §§ 251, 267; Rives *v.* Wilborne, 6 Alabama, 45; Cordaman *v.* Malone, 63 Ibid. 556; Powell *v.* Rankin, 80 Ibid. 316; Kane *v.* Pilcher, 7 B. Monroe, 651; McKinney *v.* Purcell, 28 Kansas, 446. In Jones *v.* Peasley, 3 G. Greene, 53, it was held by the Supreme Court of Iowa, that a bond conditioned "that the attached property, or its appraised value, shall be forthcoming to answer the judgment of the court," discharges the property from the lien of the attachment, and leaves it subject to a subsequent attachment for the defendant's debts, and that the obligors cannot defend against the bond, because the property was subsequently attached by other creditors. The same view was held by the Supreme Court of Ohio, in Root *v.* Railroad Co., 45 Ohio State, 222.

[3] Gordon *v.* Johnston, 4 Louisiana, 304.

§ 332. By executing such a bond, the defendant is held to have acknowledged notice of the suit, and to be bound to enter an appearance, or be liable to be proceeded against as in case of personal service of process;[1] and the execution of the bond is sufficient presumptive evidence that the property was found by the sheriff in the possession of the defendant.[2] And when, as is in some States authorized, a person not a party to the suit replevies the property, he by that act introduces himself to the suit, and becomes, though not a technical party, yet a party to the proceedings; and being in the possession of property which is in the custody of the law, he is within the legitimate reach of proper action by the court in which the suit is pending, in regard to the property.[3] The giving of such a bond is not an acknowledgment that the writ was rightfully issued;[4] but it is a waiver of any irregularities in the attachment proceedings.[5]

§ 333. This bond cannot be executed, so as to constitute an effective and reliable security to the officer or the plaintiff, by any party not thereto authorized by law. If executed by one not so authorized, it will not be sustained, either as a statutory or common-law bond.[6]

§ 333 *a*. The execution of a bond of this description, by a person other than the defendant, is authorized in some States. Where so executed, what is the relation of the party executing it to the defendant? This question came up in Alabama, under a statute authorizing personal property taken in attachment to be replevied by the defendant, "or, in his absence, by a stranger." The word "stranger" was considered to mean a person not a party to the suit, who acts for the benefit of the defendant; and it was held, that in providing for a replevy by a stranger, it was not intended to restrict or impair the defendant's right as to the possession of the property when replevied; that the defendant has the right to demand of the stranger the possession of it; that on such demand being made, it is the duty of the stranger, either to restore the property to the defendant, or to return it to the sheriff; and that his bond is subject to such

[1] Wilkinson *v.* Patterson, 6 Howard (Mi.), 193; Richard *v.* Mooney, 39 Mississippi, 357; Blyler *v.* Kline, 64 Penn. State, 130; Peebles *v.* Weir, 60 Alabama, 413; Chastain *v.* Armstrong, 85 Ibid. 215.

[2] Hoshaw *v.* Gullett, 53 Missouri, 208.

[3] Kirk *v.* Morris, 40 Alabama, 225.

[4] Avet *v.* Albo, 21 Louisiana Annual, 349.

[5] New Haven L. Co. *v.* Raymond, 76 Iowa, 225

[6] Cummins *v.* Gray, 5 Stewart & Porter, 397; Sewall *v.* Franklin, 2 Porter, 493.

rules as would govern it if made by the defendant himself.[1] And afterwards, in the same State and under the same statute, where trover was brought against the replevying "stranger," he was considered as holding under the defendant, and entitled to make all defences which the defendant could have made, if he had been sued.[2] And in the same State it was held, that by the execution of the replevy bond the stranger so far connects himself with the attachment suit, that he must take notice of the judgment therein rendered, and cannot, while retaining the goods under the bond, dispute or deny the title of the defendant. Even if the title resides in the stranger, and the defendant is without an attachable interest therein, this will not excuse the former from performance of the condition of the bond. He must redeliver the goods to answer the levy of the writ, after which he may interpose a claim for them.[3]

§ 334. Where the bond calls for the delivery of the property at a specified place, no demand is necessary.[4] When the property is to be delivered "when and where the court shall direct," an order of court for its delivery is necessary to render the obligors liable. The judgment of the court against the defendant in the attachment suit, and an execution issued to the sheriff, do not constitute an order to the obligors to deliver the property at a given time and place.[5]

Where the bond is for the delivery of the property within a stipulated time after the rendition of a judgment in favor of the plaintiff in the attachment suit, it is not necessary, to sustain an action on the bond, that an order be made that the judgment shall be a lien on the attached property, or directing the sale of the property. The right of action is complete upon the failure to deliver the property within the stipulated time.[6] And where the obligation was for the delivery of the attached property to the officer, "if so ordered by the court on the 16th of August, 1878;" and the case was continued till the 18th of October, when judgment was rendered for the plaintiff, and execution was issued thereon; under which the officer demanded the return of the property, which was refused; and the officer sued on the obligation; it was held, that the fact that the judgment was rendered on a day subsequent to that named in the agreement was

[1] Kirk *v.* Morris, 40 Alabama, 225; Rhodes *v.* Smith, 66 Ibid. 174.
[2] Morris *v.* Hall, 41 Alabama, 510.
[3] Rhodes *v.* Smith, 66 Alabama, 174.
[4] Mitchell *v.* Merrill, 2 Blackford, 87.
[5] Brotherton *v.* Thomson, 11 Missouri, 94.
[6] Waynant *v.* Dodson, 12 Iowa, 22.

wholly unimportant; that time was not of the essence of the contract; and that it was the duty of the obligor to return the property on any subsequent day when the officer was entitled to demand and receive it.[1]

§ 335. If, after the defendant has given a delivery bond for attached property, the court, pending the suit, orders the property to be delivered into the custody of the officer and sold, and this is done, the sureties in the bond are discharged.[2] And the surety in such a bond may exonerate himself therefrom, by delivering the property to the officer, at any time before judgment is rendered against him on the bond;[3] but not by an offer to return it.[4] This delivery must be an actual one, — that is, the property must be brought, and pointed out, and offered to the officer. Therefore, where a forthcoming bond was given for a slave, and the principal, on the day the slave was to be delivered, met the officer crossing the street rapidly, and said to him, "Here is the boy; I have brought him to release J. on that bond;" and the officer replied, "Very well;" but the slave was not pointed out, and the officer did not see him; it was held to be no proper delivery.[5] And the bond is not discharged by the delivery of any less than the *whole* of the property. The officer may seize and sell, under execution, whatever of it he may find, and credit the amount of the sale on the bond.[6]

§ 335 *a*. Where the terms of the bond are, that, in case the plaintiff should recover judgment against the defendant in the action, the defendant would, on demand, redeliver the attached property to the proper officer to be applied to the payment of the judgment; or that, in default thereof, he and his sureties would, on demand, pay to the plaintiff the full value of the property, not exceeding a named sum; the officer must make a demand in fact before the bond can be sued on.[7] But not so, it is said, where the defendant has removed the property out of the jurisdiction of the court.[8]

§ 336. The signers of such a bond cannot object that it is not their deed, because it was written over their signatures delivered

[1] Turner *v.* Armstrong, 9 Bradwell, 24.
[2] Richards *v.* Craig, 8 Baxter, 457.
[3] Reagan *v.* Kitchen, 3 Martin, 418; Hansford *v.* Perrin, 6 B. Monroe, 595; Kirk *v.* Morris, 40 Alabama, 225.
[4] Metrovich *v.* Jovovich, 58 California, 341.
[5] Pogue *v.* Joyner, 7 Arkansas, 462; Chapline *v.* Robertson, 44 Ibid. 202.
[6] Metrovich *v.* Jovovich, 58 California, 341.
[7] Pierce *v.* Whiting, 63 California, 538.
[8] Driggs *v.* Harrington, 2 Montana, 20.

to the officer in blank, instead of their signatures being affixed after the instrument was written. In such case the officer acts as the agent of the obligors in filling up the writing, and may prove his agency; and if he be dead, his declarations in relation to it may be given in evidence, as part of the *res gestæ*.[1] In the case in which this was decided, all the parties to the paper wrote their names upon it, with the intention that it should be filled up as a forthcoming bond, and delivered it to the officer for the purpose of being so filled up.

But where the paper is signed by a surety, with an understanding that others are to sign it with him, and it is delivered without their signatures being obtained, the surety will not be bound. This was so held, where a surety signed a bond in which the names of three principals were written, only one of whom signed it;[2] and where the surety signed, under a representation that two others would become co-sureties with him, and the bond was delivered without their signatures having been obtained.[3]

Where the statute requires the bond to be with sureties, and one is given in which the obligors are named as principals, and no one as surety; the obligors cannot object to the validity of the bond for want of sureties.[4]

§ 336 *a*. In Texas it is held, that the obligation of the sureties in a forthcoming bond is upon two conditions: 1. That the proceeding in attachment was legal and proper; and 2. That the property levied on was subject to attachment; and that therefore, to relieve themselves from liability, they may move to quash the attachment.[5] And in Georgia it was decided that there could be no legal judgment against the surety where the attachment was void.[6]

§ 337. The seizure of property under attachment, upon which the party having it in possession has a lien, cannot devest the lien. And if such party release it by giving bond, it seems he will be responsible on the bond for no more than the balance which may remain in his hands after paying himself the amount due him.[7]

[1] Yocum *v.* Barnes, 8 B. Monroe, 496.

[2] Clements *v.* Cassilly, 4 Louisiana Annual, 380. See Bean *v.* Parker, 17 Mass. 591; Wood *v.* Washburn, 2 Pick. 24.

[3] Sessions *v.* Jones, 6 Howard (Mi.), 123. See Crawford *v.* Foster, 6 Georgia, 202.

[4] Scanlan *v.* O'Brien, 21 Minnesota, 434.

[5] Burch *v.* Watts, 37 Texas, 135.

[6] Neal *v.* Gordon, 60 Georgia, 112.

[7] Canfield *v.* M'Laughlin, 10 Martin, 48.

§ 338. In Kentucky, under their practice of attachment in chancery, it was held, that suit on a bond for the forthcoming of attached property was prematurely brought, where the Chancellor had not disposed of the case, and remitted the party to his remedy on the bond.[1] In the same State it was held, in relation to such a bond, that the surety ought not to be proceeded against alone, where the principal was within reach of the process of the court.[2] And in Louisiana, the surety cannot be made liable, until restoration of the property or payment of the bond has been demanded of the principal.[3] But it is not necessary that a demand upon the surety, or notice to him of the order of the court for the delivery of the property, should be shown, in order to sustain a proceeding against him on the bond.[4]

§ 339. In an action on a bond of this description, the obligors cannot complain that the penalty in it is not as large as the law required;[5] nor can they question the validity of the officer's levy of the attachment;[6] nor object to the validity of the affidavit on which the writ issued;[7] nor complain of mere errors in the action against their principal.[8] Nor is it competent for them to aver that the property attached was not the defendant's, but belonged to a third person, who took it into his possession, whereby they were prevented from having it forthcoming to answer the judgment of the court. They undertake to have it forthcoming, and it is their duty to comply with their obligation, and leave it to the plaintiff in the attachment and the claimant of the property to litigate their rights; not to take it out of the possession of the plaintiff, and put it into that of an adverse claimant, and thus excuse themselves for a breach of their covenant.[9] Equally are the parties to such a bond estopped from

[1] Hansford *v.* Perrin, 6 B. Monroe, 595.

[2] Page *v.* Long, 4 B. Monroe, 121.

[3] Goodman *v.* Allen, 6 Louisiana Annual, 371.

[4] Weed *v.* Dills, 34 Missouri, 483.

[5] Jones *v.* M. & A. Railroad Co., 5 Howard (Mi.), 407.

[6] Scanlan *v.* O'Brien, 21 Minnesota, 434.

[7] Goebel *v.* Stevenson, 35 Michigan, 172. But in Georgia the surety in a delivery bond was allowed to move in arrest of judgment against him, on the ground that the affidavit was insufficient to authorize the issue of the attachment; and that after a like motion by the defendant had been overruled. The grounds of this ruling were not stated by the court. Neal *v.* Gordon, 60 Georgia, 112.

[8] Atkinson *v.* Foxworth, 53 Mississippi, 733; Hammond *v.* Starr, 79 California, 556.

[9] Sartin *v.* Wier, 3 Stewart & Porter, 421; Gray *v.* MacLean, 17 Illinois, 404; Dorr *v.* Clark, 7 Michigan, 310; Easton *v.* Goodwin, 22 Minnesota, 426; Sponenbarger *v.* Lemert, 23 Kansas, 55; Haxtun *v.* Sizer, Ibid. 310; Wolf *v.* Hahn, 28

denying the admissions made in the condition of the bond. Therefore, where a bond recited the issuing of an attachment and its levy on the property, it was decided that the obligors could not, in an action on the instrument, deny that an attachment had issued and been levied.[1] And where a party gave bond to hold attached property or its proceeds subject to the judgment of the court, he was not allowed to set up as a defence against the bond, that the sheriff to whom it was given had no legal or equitable interest in the property.[2] And where the condition of the bond was the delivery of the attached property to the sheriff, in the event of a judgment being rendered against the defendant, it was held, that it was no defence to a surety that the judgment against the defendant did not order the property to be sold.[3] Nor in such cases is it any defence against a recovery on the bond, that, after its execution, the property was seized under process of court, or otherwise, and taken from the possession of the obligor; for he could protect his right of possession by replevying it.[4]

§ 340. Where statutory provision is made allowing a party other than the defendant to retain attached property, on executing a forthcoming bond therefor, if such party claim to be the owner of the property, he must nevertheless return it to the officer, and then assert his claim. He cannot set up his ownership as a defence to an action on the bond.[5] But where, in an

Ibid. 588; Case *v.* Steele, 34 Ibid. 90. In Iowa, where such a defence is allowed by statute, it was held not sufficient to aver that the property was not the defendant's; but the plea must show whose it was. Blatchley *v.* Adair, 5 Iowa, 545. In Kentucky, in an action on a bond, the undertaking of which was, "that the defendant S. shall perform the judgment of the court in this action, or that the undersigned H. will have the seventy-five hogs attached in this action, or their value, $412, forthcoming and subject to the order of the court for the satisfaction of such judgment;" it was held, that the owner of property, attached in an action against a third person, who gives such a bond in order to retain his possession, is not thereby precluded from asserting his claim to the property, or disputing the validity of the attachment. Schwein *v.* Sims, 2 Metcalfe (Ky.), 209. See Halbert *v.* McCulloch, 3 Ibid. 456. But if he fails to assert his claim to the property until, by judgment, it is subjected to the attachment, he shall then neither be heard in a defence to the bond, nor on a suit for the recovery of the money or the property. Miller *v.* Desha, 3 Bush, 212.

[1] Crisman *v.* Matthews, 2 Illinois (1 Scammon), 148; Price *v.* Kennedy, 16 Louisiana Annual, 78; Pierce *v.* Whiting, 63 California, 538. But in Tennessee, in a proceeding in chancery, a delivery bond was set aside, upon its being shown that it had been given on the representation of the officer that he had attached property, when, in fact, he had not done so. Connell *v.* Scott, 5 Baxter, 595.

[2] Morgan *v.* Furst, 4 Martin, N. S. 116.

[3] Guay *v.* Andrews, 8 Louisiana Annual, 141.

[4] Roberts *v.* Dunn, 71 Illinois, 46.

[5] Braley *v.* Clark, 22 Alabama, 361; Cooper *v.* Peck, Ibid. 406; Morgan *v.* Furst, 4 Martin, N. S. 116.

action against A., goods were found in the possession of B.; who claimed ownership of them under a chattel mortgage from A., and, while asserting his ownership, gave a delivery bond for the goods, and by leave of court filed an interplea claiming the goods, and the attaching plaintiff sued B. on the bond, claiming that the latter, by giving the bond, was estopped from denying that the goods were, when attached, the property of A.; the court decided against the estoppel, and said: "In the absence of evidence to show that plaintiff has been deceived, or induced, in some way injurious or prejudicial to him, to alter his position with reference to the property of his debtor in the writ, in consequence of the execution of the delivery bond, we see no good reason why the mere giving of the bond, which is done simply to retain possession, should, as against such a plaintiff, be held an admission of ownership in the defendant in the attachment writ, or should of itself preclude the interpleader, upon a trial between him and the attaching creditor, from asserting his title and ownership of the goods covered by the bond."[1]

Where the property is attached in the hands of a third person, who gives a delivery bond therefor, if he claims that the property is his, he must, in order to be in a position to demand the judgment of the court on his right thereto, file his interplea in the case while it is pending and undetermined; he cannot, after final judgment and a return of *nulla bona* on the execution, interplead and claim the property as his own.[2]

§ 340 *a*. When the defendant releases property on bond, he undertakes to make successful defence to the action, and if he fail, his liability upon the bond becomes irrevocably fixed by the final judgment. So, too, with a third party who gives such a bond; he undertakes to justify the delivery of the property to himself, and to make that justification in the suit to which he has voluntarily made himself a party; he assumes that he has the right to intervene on account of the property; and if he fail, he becomes responsible on his bond, and cannot be permitted to litigate the action again upon other grounds.[3]

§ 340 *b*. A delivery bond is a substitute for the property attached, only with regard to the plaintiff. A third party claim-

[1] Petring *v.* Chrisler, 90 Missouri, 649. See Applewhite *v.* Harrell Mill Co., 49 Arkansas, 279.

[2] McElfatrick *v.* Macauley, 15 Missouri Appeal, 102.

[3] Wright *v.* Oakey, 16 Louisiana Annual, 125.

ing the property cannot, in reference thereto, maintain an action on the bond.[1]

§ 341. If the obligors in the bond are prevented by the act of God from delivering the property, their liability is discharged. Therefore, where the bond was for the forthcoming of a slave, who died before the parties were bound to deliver him, it was decided that they were not responsible.[2] This rule, however, is not of universal application, but the obligor may, by his own conduct, lose the benefit of it. There is a distinction between a bond rightly given, to retain possession until the litigation be ended, and one given wrongfully to get a possession to which the party is not legally entitled. A bond of the former description is usually given by or on behalf of the defendant, and does the plaintiff no legal injury. One of the latter description is, where a third party comes into the case as claimant, and seeks possession of the property until his claim is adjudicated. In such case, if his claim is rejected, he is to be regarded as a bailee in his own wrong, liable for all accidents, and taking all the hazards; this being considered very different from a case wherein one of two equally innocent parties must suffer by an inevitable casualty. Therefore, where such a claimant gave such a bond for a horse that was attached, and presented his claim therefor, and the court found against his claim, and ordered him to produce the horse; and he responded that, before judgment, and without his fault, but by the act of God, the horse had died; he was nevertheless held liable upon the bond.[3]

§ 341 *a*. If through the instrumentality of the attachment plaintiff the obligors are prevented from delivering the property, no action will lie on the bond. Thus, where attached property was released from the custody of the officer, upon a bond being executed to him for that purpose, and afterwards an execution in favor of a stranger to the attachment proceedings, issued after levy of the attachment, was levied upon the attached property by the consent and direction of the attachment plaintiff, and the property was sold under the execution; it was held, that there could be no recovery on the bond.[4]

[1] Wright *v.* White, 14 Louisiana Annual, 583; White *v.* Hawkins, 16 Ibid. 25.

[2] *Post*, § 385; Falls *v.* Weissinger, 11 Alabama, 801.

[3] Dear *v.* Brannon, 4 Bush, 471. *Sed contra*, Atkinson *v.* Foxworth, 53 Mississippi, 741.

[4] Jæger *v.* Stœlting, 30 Indiana, 341.

§ 341 *b*. The dissolution of the attachment discharges the obligation of the sureties in a delivery bond.[1] Thus the discharge of the principal in bankruptcy, before judgment rendered against him, has that effect.[2] And so, if within four months after the levy of the attachment a petition in bankruptcy be filed against the attachment defendant, and he be adjudged bankrupt.[3] And so, where the death of the defendant has the effect of dissolving the attachment.[4]

§ 341 *c*. If the fulfilment of the obligation of a delivery bond be made by law impossible, the bond cannot be enforced. Thus where a bond was given for the forthcoming of slaves which had been attached, it was held, that it could not be enforced after the slaves had been emancipated by the thirteenth amendment to the Constitution of the United States.[5]

§ 341 *d*. Though, as we have seen,[6] attached property, for which a delivery bond has been given, cannot lawfully be again taken under a junior attachment, yet if it be so taken from the possession of the sureties in the bond, and delivered to the plaintiff in the junior attachment, by whom it is removed and sold, the sureties are thereby discharged from the obligation of the bond; and the plaintiff in the first attachment may hold the officer who levied the junior attachment for the value of the property, and perhaps may maintain an action for money had and received against the plaintiff in the junior attachment.[7]

§ 342. The measure of recovery on a delivery bond is the value of the property secured by it, not exceeding the amount of the plaintiff's recovery in the attachment suit.[8] And the value is that which the property had at the time it was attached, not at the time of judgment recovered in the attachment suit.[9] If the value be stated in the bond, it will be conclusive on the obligors; if not stated, it must be established by proof. Where, therefore, the bond was in double the amount of the demand in the attachment suit, it was held to be error, in the absence of

[1] Bildersee *v.* Aden, 10 Abbott Pract. N. s. 163; Gass *v.* Williams, 46 Indiana, 253.

[2] Payne *v.* Able, 7 Bush, 344.

[3] Kaiser *v.* Richardson, 5 Daly, 301.

[4] Upham *v.* Dodge, 11 Rhode Island, 621.

[5] Young *v.* Pickens, 45 Mississippi, 553. See Green *v.* Lanier, 5 Heiskell, 662, and the comments on it in Barry *v.* Frayser, 10 Ibid. 206.

[6] *Ante*, § 331.

[7] Cordaman *v.* Malone, 63 Alabama, 556.

[8] Hammond *v.* Starr, 79 California, 556.

[9] Perry *v.* Post, 45 Conn. 354.

proof of value, for the court to instruct the jury, that they should assume the half of the penalty of the bond to be the true value of the property.[1] And if the property be sold at sheriff's sale, by order of the court, the price for which it sold is not the measure of the damages recoverable on the bond.[2] Where the law provided that judgment should not be entered against the surety for a sum greater than the assessed value of the property, it was decided, that if there was no assessment of its value, there could be no judgment against the surety.[3] If the property was subject to a prior valid lien, and the surety in the bond allow it to be taken from him under such prior lien, his obligation will not thereby be discharged; but only nominal damages can be recovered against him, unless the property was greater than the amount of the lien; in which case the excess would be the measure of damages.[4]

§ 343. If one joint obligor in a delivery bond be compelled to pay the whole amount of a judgment recovered on the bond, he may maintain an action against his co-obligor for contribution.[5]

[1] Collins *v.* Mitchell, 3 Florida, 4; Moon *v.* Story, 2 B. Monroe, 354; Weed *v.* Dills, 34 Missouri, 483; Turner *v.* Armstrong, 9 Bradwell, 24.

[2] Trentman *v.* Wiley, 85 Indiana, 33.

[3] Richard *v.* Mooney, 39 Mississippi, 357; Phillips *v.* Harvey, 50 Ibid. 489.

[4] Dehler *v.* Held, 50 Illinois, 491; Hayman *v.* Hallam, 79 Kentucky, 389.

[5] Labeaume *v.* Sweeney, 17 Missouri, 153.

CHAPTER XIV.

BAILMENT OF ATTACHED PROPERTY.

§ 344. In the New England States and New York, a practice exists, which allows an officer who has attached personal property on *mesne* process, to dispense with his own actual custody thereof, by delivering it to some other person, — usually a friend of the defendant, though the plaintiff may lawfully become the bailee,[1] — and taking from him a writing, acknowledging the receipt, and promising to redeliver the property to the officer on demand. This practice has not its authority in any statutory provision; but is nevertheless in constant use in those States; and though not regarded as one to which the officer is officially bound to conform,[2] has yet become so well settled, and is so far held in regard, that the Superior Court of New Hampshire remarked, that "there are cases in which a sheriff, if he should refuse to deliver goods to a friend of the debtor, upon an offer of good security, would deserve severe censure."[3] The same court said: "It is true that when goods are attached the sheriff may retain them in his own custody in all cases, if he so choose. But it would often subject him to great inconvenience and trouble so to retain them. In many cases, the interest both of the debtor and the creditor requires that they should be delivered

[1] Tomlinson *v.* Collins, 20 Conn. 364.

[2] Davis *v.* Miller, 1 Vermont, 9; Moulton *v.* Chadborne, 31 Maine, 152. In Batchelder *v.* Frank, 49 Vermont, 90, the court said: "The law does not require the officer to take a receipt for property attached. . . . Whether the official will or will not take a receipt, is not the exercise of official function, but is determined by him on personal reasons, in view of all that appertains to the subject; and those reasons are not amenable to judicial inquiry as between him and the party whose receipt he declines to take."

[3] Runlett *v.* Bell, 5 New Hamp. 433. The Supreme Court of Vermont, in relation to this practice, said: "The taking of a receipt for property attached is a common mode of perfecting an attachment. It saves expense to all the parties, relieves the officer of the care and custody of the property, and gives the creditor all he seeks for by his attachment, viz., security for his debt. It is at once so convenient and so safe a mode of securing all the purposes of an attachment that it has been adopted universally in practice; and though not authorized by statute, is recognized in law as an official act having definite and well-settled rights, duties, and obligations." Austin *v.* Burlington, 34 Vermont, 506.

to some person, who will agree to be responsible for them. And it is a common practice so to deliver them; a practice which is not only lawful, but in a high degree useful and convenient."[1] In Maine, the consent of the plaintiff to this bailment is necessary to discharge the officer from responsibility to him for the property. If the goods be delivered to a receiptor without the plaintiff's consent, the officer will be liable to him at all events for them, if they are needed to satisfy an execution obtained by the plaintiff.[2] In that State it is held, that if the creditor *direct* the officer to take the receipt, he elects to rely upon it, rather than upon any obligation of the officer to keep the property safely;[3] but a mere approval by the creditor of the ability of a receiptor for attached property, does not exonerate the officer from making effort to find the property to respond to execution, or from the duty of bringing a suit upon the receipt.[4]

§ 345. This contract of bailment does not seem to be uniform in its terms, either throughout the States in which it is resorted to, or in any one of them, but varies according to the circumstances of the case, or the intent of the parties. Sometimes, and most frequently, the bailee simply acknowledges to have received from the officer certain goods, attached by the latter in a case named, which he agrees to return to the officer on demand. Sometimes the value of the goods is stated; and not unusually the contract is in the alternative, either to return the

[1] Runlett *v.* Bell, 5 New Hamp. 433. In Phelps *v.* Gilchrist, 8 Foster, 266, BELL, J., used the following language in reference to this practice: "The practice of delivering property attached to a bailee for safe keeping, must have been coeval with the practice of making such attachments. It is, in its nature, a simple deposit, a delivery of the property to be kept by the depositary, without compensation, until called for by the attaching officer. No particular agreement was necessary, and no writing was required. The convenience and safety, perhaps of both parties, would render some writing showing the facts necessary, in cases where the number of the articles attached was considerable. In general, a simple receipt, admitting that the articles enumerated had been delivered by the officer to the receiptor for safe keeping, and to be returned, on request, would be the most natural form of such a writing. Various circumstances, which might become material to the parties, would as naturally be introduced, as their utility came to be seen, until everything supposed to be otherwise likely to be an occasion of dispute, would be mentioned. . . . There is ordinarily, however, nothing in such a receipt which changes the duties or obligations of the parties, from what they would be, on a simple deposit, without any writing whatever. Usually the sole advantage of the writing is, that it contains evidence of facts which, in the event of any controversy, may be disputed, and may sometimes be difficult of proof."

[2] Moulton *v.* Chadborne, 31 Maine, 152; Franklin Bank *v.* Small, 24 Ibid. 52; Torrey *v.* Otis, 67 Ibid. 573.

[3] Davis *v.* Maloney, 79 Maine, 110.

[4] Allen *v.* Doyle, 33 Maine, 420.

goods, or pay the debt and costs in the case. In such case the receipt is none the less a positive contract to redeliver the goods; the alternative embraced in it does not authorize the bailee to refuse to surrender the goods, nor can it in any sense be construed as vesting in him a power of sale.[1] In such case the bailee cannot require the officer to take an equal quantity of goods of the same kind and quality, or discharge himself by paying the officer the value of the goods; but he must return the identical articles delivered to him, or pay the debt.[2] Occasionally, too, the receipt gives the bailee the alternative of returning the goods, or indemnifying the officer against all damages he may sustain in consequence of his having attached the property. In such a case, where an action was brought on the receipt, it was urged at bar that the receipt, being in the alternative, gave the receiptor, at his election, the right to return the property or indemnify the officer; and that if he did not return the property on demand, the alternative became absolute, and no action would accrue on the contract till the officer had been damnified. But the court said: "This is not a sound construction of the contract, and cannot be conformable to the intent of the parties. The officer had no power to make any disposition of the property otherwise than for safe keeping; and to construe this contract, in effect, as a conditional sale, would pervert the very object of the parties. The only effect which the latter clause in the receipt can have is to measure the extent of the receiptor's liability, and is no more than a legal result of a non-delivery of the property."[3] But where the contract of the receiptor is to pay the officer a specified sum, or redeliver the property on demand, it is held, in Maine, that the receiptor has the election to pay the money or deliver the property; that the officer must be considered as having abandoned his possession; and that the attachment is thereby dissolved.[4]

§ 346. Usually the receipt makes specific mention of the goods attached; and this is always desirable, but not necessary to the legality of the contract. Whatever can, by just implication, be construed as acknowledging the receipt of property, to be redelivered to meet the exigency of the attachment, will be sufficient. As, for instance, a paper in the following form, "Value received, I promise to pay B., deputy sheriff, $400 on demand and interest,

[1] Sibley v. Story, 8 Vermont, 15.
[2] Anthony v. Comstock, 1 Rhode Island, 454.
[3] Page v. Thrall, 11 Vermont, 230.
[4] Waterhouse v. Bird, 37 Maine, 326; Waterman v. Treat, 49 Ibid. 309.

— said note being security to said B. for a writ C. *vs.* D. which is this day sued," was held to be in effect an acknowledgment of property to that amount received as attached on the writ, and a valid receipt.[1]

§ 347. Over this contract the plaintiff in the action has no control; but it is taken by the officer for his own security, that he may be enabled to discharge the responsibility he has assumed in his official capacity. But, if, after the plaintiff has obtained judgment in his action, the officer deliver a receipt taken therein for goods, to the plaintiff's attorney, to be prosecuted for the plaintiff's benefit, this is an equitable assignment of it, which will preclude the officer from interfering with the avails of the receipt when judgment has been obtained on it, though obtained in his name.[2]

§ 348. An officer having attached chattels becomes liable for them, at the termination of the suit, either to the plaintiff or the defendant; to the former, if he obtain judgment, and issue execution, and take the necessary steps to have it levied pursuant to the attachment; to the latter, if the attachment be dissolved, by judgment in his favor or otherwise.[3] Under such circumstances it is manifest that a bailment of the property, if it were not recognized as a legal act of the officer, would not in any way affect his relations to the plaintiff and defendant; and consequently he would be under the necessity, either of retaining the property in his own actual custody, or of assuming upon himself the entire responsibility of suffering it to go into the hands of a third person. But we have seen that the bailment, wherever this practice prevails, is regarded as a legal act; and it must needs be, therefore, that questions will arise as to the rights, duties, and liabilities of all the parties. These we will now proceed to consider.

§ 349. That which seems to lie nearest the foundation of this subject is the relation established by the contract of bailment between the officer and the bailee. This has been the subject of frequent discussion, and the conclusion seems to have been generally arrived at, that the bailee is to be viewed in the light

[1] Bruce *v.* Pettengill, 12 New Hamp. 311.

[2] Clark *v.* Clough, 3 Maine, 357; Jewett *v.* Dockray, 34 Ibid. 45; Phillips *v.* Bridge, 11 Mass. 242.

[3] Lawrence *v.* Rice, 12 Metcalf, 527; Torrey *v.* Otis, 67 Maine, 573.

of a servant or agent of the officer.[1] In New York he was formerly regarded as a mere naked bailee, having no interest or property in the goods; and in Massachusetts such is the doctrine now; but however true this may be as between him and the officer, it will be seen, in another place,[2] that the weight of reason and authority is greatly in favor of his being considered as having rights in the property, as against third persons, which will enable him to maintain his possession of it. All questions, however, arising between him and the officer will be found to be materially affected by their mutual relation being regarded as that of master and servant, or principal and agent.

§ 350. An officer, by the levy of an attachment, acquires a special property in the goods seized.[3] As long as the attachment continues in force, and its lien upon the property remains undisturbed, that special property exists, and enables the officer to maintain his rights acquired by the levy. An indispensable element of the continued existence of the lien is, the officer's continued possession of the property, actual or constructive, that is, personally or by another.[4] As the bailment of it is, for the time, a surrender of his personal or actual possession, what is the effect of the bailment on the lien of the attachment?

§ 351. In Massachusetts, it was once held to be very clear, that after an officer had delivered attached property to a receiptor, and taken his receipt therefor, and his promise to redeliver it on demand, it could no longer be considered as in the constructive possession of the officer.[5] But this view is wholly inconsistent with other decisions in the same State,[6] and not less with the doctrine maintained there in numerous cases, that the special property of the officer in the goods continues after the bailment, and that the receiptor is the mere servant of the officer, having himself no rights in the goods, and therefore unable even to maintain legal remedies for the disturbance of his possession. Equally is it opposed to the current of authority

[1] Ludden v. Leavitt, 9 Mass. 104; Warren v. Leland, Ibid. 265; Bond v. Padelford, 13 Ibid. 394; Commonwealth v. Morse, 14 Ibid. 217; Brownell v. Manchester, 1 Pick. 232; Small v. Hutchins, 19 Maine, 255; Eastman v. Avery, 23 Ibid. 248; Barker v. Miller, 6 Johnson, 195; Brown v. Cook, 9 Ibid. 361; Dillenback v. Jerome, 7 Cowen, 294; Mitchell v. Hinman, 8 Wendell, 667; Gilbert v. Crandall, 34 Vermont, 188.

[2] *Post*, § 367.

[3] *Ante*, § 291.

[4] *Ante*, § 290.

[5] Knap v. Sprague, 9 Mass. 258.

[6] Bond v. Padelford, 13 Mass. 394; Baker v. Fuller, 21 Pick. 318; Ludden v. Leavitt, 9 Mass. 104.

elsewhere. In Vermont, New Hampshire, and Connecticut, it has always been considered that the delivery of attached property to a receiptor and taking his receipt therefor, does not discharge the lien of the attachment, nor devest the officer of his custody of, or of his special property in, the goods.[1]

§ 352. In Maine, under a statute which declares "that when hay in a barn, sheep, horses, or neat cattle are attached on *mesne* process, at the suit of a *bona fide* creditor, and are suffered by the officer making such attachment to remain in the possession of the debtor, on security given for the safe keeping or delivery thereof to such officer, the same shall not, by reason of such possession of the debtor be subject to a second attachment, to the prejudice of the first attachment;" it was held, that this was designed to preserve and continue the lien on the property attached, in the same manner as though it had remained in the exclusive possession of the officer; that in such case the debtor cannot sell the property; and that even a *bona fide* purchaser of it without notice acquires no rights in it.[2]

§ 353. Since, then, the officer's special property is not lost by the bailment, and the bailee stands in the position of his servant, it follows that the officer — where no time is stated in the receipt for the return of the goods — may, at any time while his special property in them continues, or while he is responsible for them to any party in the suit, or to the owner of them, retake them into his actual possession, from the bailee, or from the defendant, if the bailee shall have suffered them to go back into his possession;[3] and this, as well where the bailment is the act of his deputy, and the receipt is taken by the deputy in his own

[1] Pierson *v.* Hovey, 1 D. Chipman, 51; Enos *v.* Brown, Ibid. 280; Beach *v.* Abbott, 4 Vermont, 605; Rood *v.* Scott, 5 Ibid. 263; Sibley *v.* Story, 8 Ibid. 15; Kelly *v.* Dexter, 15 Ibid. 310; Whitney *v.* Farwell, 10 New Hamp. 9; Rowe *v.* Page, 54 Ibid. 190; Buzzell *v.* Hardy, 58 Ibid. 330; Tomlinson *v.* Collins, 20 Conn. 364.

[2] Woodman *v.* Trafton, 7 Maine, 178; Carr *v.* Farley, 12 Ibid. 328.

[3] Pierson *v.* Hovey, 1 D. Chipman, 51; Enos *v.* Brown, Ibid. 280; Beach *v.* Abbott, 4 Vermont, 605; Rood *v.* Scott, 5 Ibid. 263; Sibley *v.* Story, 8 Ibid. 15; Kelly *v.* Dexter, 15 Ibid. 310; Briggs *v.* Mason, 31 Ibid. 433; Odiorne *v.* Colley, 2 New Hamp. 66; Whitney *v.* Farwell, 10 Ibid. 9; Bond *v.* Padelford, 13 Mass. 394. But in Massachusetts it was held, that a delivery of the attached goods by the receiptor to the defendant, legally operates as a discharge of the attachment, and a termination of the attaching officer's special property in them. Baker *v.* Warren, 6 Gray, 527; Colwell *v.* Richards, 9 Ibid. 374. And the same view is held in Maine. Waterhouse *v.* Bird, 37 Maine, 326; Stanley *v.* Drinkwater, 43 Ibid. 468.

name, as where the contract is in the name of the principal.[1] The Supreme Court of Maine once expressed serious doubts whether the officer could retake the property without the consent of the debtor or receiptor;[2] but afterwards expressed itself thus: "The defendant (the receiptor) is the mere bailee of the plaintiff (the sheriff). He is bound to surrender the property on seasonable demand, whenever the plaintiff may require it, whether there has been a judgment in the action in which the attachment was made or not. He has no interest in the property bailed by which he can retain it as against the bailor. His contract is with the officer attaching and no one else. The officer has a right at any moment to the possession of the property, that he may be ready to restore it to the defendant, if the attachment is dissolved, or that it may be sold on the execution if the plaintiff recover judgment."[3]

§ 354. This right, where there is but one attachment, usually depends on the officer's responsibility to the plaintiff; that is, upon the necessity for his having the property in hand to satisfy the plaintiff's demand. If, by the dissolution of the attachment, that necessity has ceased to exist, and at the same time the bailee has suffered the property to go back into the defendant's hands, the officer, not being any longer responsible for it to either plaintiff or defendant, cannot demand it of his bailee. But if, upon the dissolution of the attachment, the property be still in the bailee's possession, the officer, being bound to restore it to the defendant, or to the owner, may demand it from the bailee for that purpose.[4]

§ 355. If, while the property is still in the bailee's possession, the same officer lay a second attachment on it, his control over it is not terminated by the dissolution of that under which the bailment was created, if the second attachment remains in force; for by the second attachment he becomes responsible for the property to the plaintiff therein; and the bailee is responsible to him. That this should be so, depends, of course, on the legality of a second attachment, of which there can be no doubt.[5]

§ 356. While attached property remains in the possession of the attaching officer, or of his bailee, no other officer can levy

[1] Baker *v.* Fuller, 21 Pick. 318; Davis *v.* Miller, 1 Vermont, 9.
[2] Weston *v.* Dorr, 25 Maine, 176.
[3] Bangs *v.* Beacham, 68 Maine, 425.
[4] Whittier *v.* Smith, 11 Mass. 211; Webster *v.* Harper, 7 New Hamp. 594; Bell *v.* Shafer, 58 Wisconsin, 223.
[5] *Ante*, § 269.

another attachment on it.[1] But he who has seized property under an attachment, so long as he has either actual or constructive possession of it, may attach it again, at the suit of the same or another plaintiff. This right extends over property in the hands of a receiptor, as well as that in the officer's immediate custody. While it is in the receiptor's possession, the second attachment may be made by the same officer, without an actual seizure, by the officer's returning that he has attached the property, and giving the receiptor notice, with directions to hold it to answer the second writ. But if the receiptor has permitted the property to go back into the defendant's hands, a second attachment cannot be made without a new seizure.[2] When an officer lays a second attachment on goods in the hands of a bailee, the latter may decline to hold them for the security of that attachment, and may return them to the officer;[3] but if he make no objection to holding them, his liability will be the same under the second as under the first attachment.

§ 357. As has been intimated, it is very usual for the receiptor to permit the property to remain in the defendant's hands. Hence have arisen what are termed nominal attachments; that is, where the property is not actually seized, or, if seized, is left, at the time, in the defendant's possession, upon some friend of the defendant giving, in either case, a receipt therefor. Such an attachment is so far valid as to bind the officer for the value of the property and to give force to the contract betweeen him and the bailee; but, with respect to strangers, other creditors, or purchasers without notice, it is wholly inoperative.[4] The Supreme Court of Massachusetts on this point said: "Such transactions are always confidential; the sheriff takes his security from the friend of the debtor; and this friend is secured by, or relies upon, the debtor. They all act at their peril, and have it not in their power to affect the security of the attaching creditor, or by such means to withhold the property from other creditors."[5] Therefore, in all such cases, where the property remains in the debtor's hands, whether because never removed, or because re-

[1] Watson *v.* Todd, 5 Mass. 271; Vinton *v.* Bradford, 13 Ibid. 114; Thompson *v.* Marsh, 14 Ibid. 269; Odiorne *v.* Colley, 2 New Hamp. 66; Sinclair *v.* Tarbox, Ibid. 5.

[2] Knap *v.* Sprague, 9 Mass. 258; Whittier *v.* Smith, 11 Ibid. 211; Odiorne *v.* Colley, 2 New Hamp. 66; Whitney *v.* Farwell, 10 Ibid. 9; Tomlinson *v.* Collins, 20 Conn. 364.

[3] Whitney *v.* Farwell, 10 New Hamp. 9.

[4] Bridge *v.* Wyman, 14 Mass. 190; Bell *v.* Shafer, 58 Wisconsin, 223.

[5] Bridge *v.* Wyman, 14 Mass. 190; Phillips *v.* Bridge, 11 Ibid. 242.

turned after a removal, though, as we have seen, the officer may, at any time during the existence of the attachment, retake it from the defendant, if the matter be between him, the bailee, and the defendant only, yet the defendant may sell the property,[1] or it may be attached by other creditors.[2] And it is held in Massachusetts, that a delivery of the attached goods by the receiptor to the defendant legally operates as a discharge of the attachment, and a termination of the attaching officer's special property in them.[3]

§ 358. It is not, however, every possession by a defendant of his property, after an attachment and bailment of it, that will authorize a second attachment. If an officer or his bailee, still retaining his possession, *bona fide*, and from motives of humanity suffer the defendant to use attached articles, which will not be injured by such use, the attachment is not thereby dissolved.[4]

§ 359. But if the bailee permits the defendant to hold and use the property as owner, the attachment is regarded as dissolved, so far as that the property may be attached by another officer who has no knowledge that a prior attachment is still subsisting.[5] What knowledge of such fact will suffice to prevent a second attaching officer from acquiring a lien on the property thus found in the defendant's hands, may be a question. Merely knowing the fact that the property had been once under attachment will not be sufficient; for the officer might well presume that that attachment had been settled or dissolved. But if he know that the attachment and bailment still subsist, and that the property is in the hands of the defendant merely for his temporary convenience, he cannot acquire a lien by attaching it.[6]

§ 360. If the bailee go off and abandon all possession and custody of the property, and it is attached by another officer,[7] or come into the possession of an adverse claimant,[8] the lien of the first attachment is lost.

[1] Denny *v.* Willard, 11 Pick. 519; Robinson *v.* Mansfield, 13 Ibid. 139.

[2] Bridge *v.* Wyman, 14 Mass. 190; Dunklee *v.* Fales, 5 New Hamp. 527; Robinson *v.* Mansfield, 13 Pick. 139; Pond *v.* Baker, 58 Vermont, 293.

[3] Baker *v.* Warren, 6 Gray, 527.

[4] Train *v.* Wellington, 12 Mass. 495; Baldwin *v.* Jackson, Ibid. 131; Young *v.* Walker, 12 New Hamp. 502.

[5] Whitney *v.* Farwell, 10 New Hamp. 9; Bicknell *v.* Hill, 33 Maine, 297.

[6] Young *v.* Walker, 12 New Hamp. 502.

[7] Sanderson *v.* Edwards, 16 Pick. 144.

[8] Carrington *v.* Smith, 8 Pick. 419; Boynton *v.* Warren, 99 Mass. 172; Russell *v.* Major, 29 Missouri Appeal, 167.

§ 361. An important question arises out of this practice of bailment, as to the liability of the officer for the fidelity and pecuniary ability of the bailee. It seems to be conceded, that, if the bailee is nominated or approved by the plaintiff, and he afterwards fail to deliver the property when required to meet the attachment, the officer cannot be held responsible for it.[1] All, however, that the creditor, by his consent to the bailment, is supposed to agree to, is to exonerate the officer from liability for losses occasioned by the insolvency or want of fidelity of the bailee; but not for losses occasioned by the neglect of the officer to enforce his own rights and remedies against his bailee.[2] But if the bailee be selected by the officer, and afterwards fail to deliver the property, and the value of it cannot be made out of him, can the officer protect himself from liability for the value of the property?

§ 362. In Massachusetts, MORTON, J., said: "The officer who attaches personal property is bound to keep it in safety, so that it may be had to satisfy the execution which may follow the attachment. This duty he may perform himself, or by the agency of others. If he appoint an unfaithful, or intrust it with an irresponsible, bailee, so that it is lost through the negligence or infidelity of the keeper, or the insufficiency of the receiptor, he will be responsible for the value of the property."[3] This doctrine was affirmed by Justice STORY, who said that if goods intrusted to a bailee "were lost, or wasted, or the bailee should become insolvent, the officer would be responsible therefor to the creditor."[4] So, in Vermont, where a bailee sold the property, and converted the proceeds to his own use, it was held, that this was the same as a conversion by the officer, and made the latter liable for the property, without a previous demand of it from him being necessary.[5] And in the same State the officer is held responsible for the fidelity and solvency of his bailee, the latter being regarded as his mere servant.[6]

§ 363. On this point, we find the Superior Court of New Hampshire taking a different ground from that taken in Massa-

[1] Donham v. Wild, 19 Pick. 520; Jenney v. Delesdernier, 20 Maine, 183; Rice v. Wilkins, 21 Ibid. 558; Farnham v. Gilman, 24 Ibid. 250.

[2] Pierce v. Strickland, 2 Story, 292.

[3] Donham v. Wild, 19 Pick. 520; Phillips v. Bridge, 11 Mass. 242; Cooper v. Mowry, 16 Ibid. 5.

[4] Pierce v. Strickland, 2 Story, 292.

[5] Johnson v. Edson, 2 Aikens, 299.

[6] Gilbert v. Crandall, 34 Vermont, 188.

chusetts and Vermont. The question there came up, in reference to the insolvency of the bailee. The court said: "To what extent is an officer responsible for goods by him attached upon an original writ, has not been settled in any adjudged case which has occurred to us. He is, without doubt, to be considered as a bailee, and answerable for the goods, either to the debtor or the creditor, if they be lost by his neglect or fault.

"Is he answerable beyond this? We are, on the whole, of opinion that he is not. As no cases directly in point are to be found, we must resort to the rules which have been applied in analogous cases.

"It seems always to have been understood as settled law, that, when a sheriff takes bail in any suit, if the bail so taken be sufficient, in all appearance, when accepted as bail, the sheriff will not be liable for their insufficiency in the end to satisfy the judgment which the plaintiff may recover. And if, in replevin, the sheriff take persons as sureties in the replevin bond, who are apparently sufficient, he will not be responsible for their sufficiency, unless he was guilty of negligence in making inquiries as to their circumstances.

"There seems to us to be a very close analogy between the cases of taking bail and replevin bonds, and the case of delivering goods which have been attached to some person for safe keeping. It is true that when goods are attached, the sheriff may retain them in his own custody, in all cases, if he so choose. But it would often subject him to great inconvenience and trouble so to retain them. In many cases, the interest of both the debtor and the creditor requires that they should be delivered to some person, who will agree to be responsible for them. And it is a common practice so to deliver them; a practice which is not only lawful, but in a high degree useful and convenient. Indeed, there are cases in which a sheriff, if he should refuse to deliver goods to a friend of the debtor, upon an offer of good security, would deserve severe censure.

"We are, therefore, induced to hold, that if a sheriff deliver goods which he has attached to persons who are apparently in good circumstances, and such as prudent men would have thought it safe to trust, for safe keeping, he is not liable, if the goods be lost through the eventual insolvency of the persons to whom they may have been so delivered." [1] In a subsequent case the same court held, that the officer is not responsible for the

[1] Runlett v. Bell, 5 New Hamp. 433; Howard v. Whittemore, 9 Ibid. 134; Bruce v. Pettengill, 12 Ibid. 341.

tortious acts of his bailee, committed without his knowledge or consent.[1]

§ 364. Here, then, is a conflict of judicial decisions, between which we will not attempt to decide. The weight of authority appears to be against the New Hampshire doctrine; but the reasoning upon which it is based is certainly calculated to shake the confidence which might otherwise be felt in the opposite opinion.

§ 365. What has been said with regard to the liability of the officer refers to his relation to the plaintiff. He is also liable to the defendant for a return of the property to him in the event of the attachment being dissolved, or the demand upon which it was issued being satisfied. Where, however, the bailment takes place with the consent of the defendant, the officer is not answerable to him for the property, until a reasonable time for recovering it from the bailee shall have elapsed, after the defendant has become entitled to have it returned to him.[2]

§ 366. Having thus stated, first, the general propositions bearing upon this contract, and then the rights and liabilities of the officer in relation to bailed property, we will now, before proceeding to the examination of his remedies, refer to the rights and duties of the bailee.

§ 367. What rights does the bailee acquire, by the bailment, in and over the attached property? In Massachusetts, he has always been considered a mere naked bailee, having no property in the goods, and unable to maintain an action for them, if taken out of his custody by a wrong-doer. In a case of similar character, the court there once held differently; considering that a naked bailee, though he might not maintain replevin, — since, to sustain that action, property in the plaintiff, either general or special, is necessary, — yet might bring trover or trespass;[3] but in every case where the point has arisen in the case of a receiptor of attached property, the same court has held that the receiptor could maintain no action at all.[4] The same doctrine was

[1] Barron v. Cobleigh, 11 New Hamp. 557.

[2] Bissell v. Huntington, 2 New Hamp. 142.

[3] Waterman v. Robinson, 5 Mass. 303.

[4] Ludden v. Leavitt, 9 Mass. 104; Perley v. Foster, Ibid. 112; Warren v. Leland, Ibid. 265; Whittier v. Smith, 11 Ibid. 211; Bond v. Padelford, 13 Ibid; 394; Commonwealth v. Morse, 14 Ibid. 217; Brownell v. Manchester, 1 Pick. 232.

long held in New York;[1] but has finally, after an extended discussion before the Court of Errors in that State, been discarded; and it is now held there, that the receiptor may maintain replevin.[2] The Superior Court of New Hampshire, at an early day, held, that for the purpose of vindicating his possession against wrong-doers, the receiptor has a special property in the goods, and may maintain trover against one who takes them from him.[3] In Vermont, it was decided that the bailee has a possessory interest in the property, which will enable him to maintain trover for it against a wrong-doer; that in order to maintain the action it is not necessary to hold that he has property in the goods; and that his possession and responsibility over to the officer furnish sufficient title and just right for him to recover.[4] In Connecticut the receiptor may maintain trespass for a violation of his possession.[5] Justice STORY, in noticing the Massachusetts doctrine, says: "It deserves consideration, whether his possession would not be a sufficient title against a mere wrong-doer; and whether his responsibility over to the officer does not furnish a just right for him to maintain an action for injuries, to which such responsibility attaches."[6] And Chancellor KENT says: "Though the bailee has no property whatever in the goods, and but a mere naked custody, yet the better opinion would seem to be, that his possession is a sufficient ground for a suit against a wrong-doer."[7] It may, therefore, be considered that the weight of authority is largely against the doctrine advanced in Massachusetts; which seems alike repugnant to well-established principles, and to the justice due to bailees in such cases.

§ 368. A receiptor's position resembles in one respect that of bail; in that he may at any time, while liable on his receipt to the officer, retake the property from the defendant's possession, and deliver it to the officer, in discharge of his receipt.[8]

§ 369. Though the mere fact of the bailment gives the receiptor no power of sale of the goods,[9] yet if he make such a sale with the assent of the debtor, and acting as his agent, it will

[1] Dillenback *v.* Jerome, 7 Cowen, 294; Norton *v.* People, 8 Ibid. 137; Mitchell *v.* Hinman, 8 Wendell, 667.

[2] Miller *v.* Adsit, 16 Wendell, 335.

[3] Poole *v.* Symonds, 1 New Hamp. 289; Whitney *v.* Farwell, 10 Ibid. 9.

[4] Thayer *v.* Hutchinson, 13 Vermont, 504.

[5] Burrows *v.* Stoddard, 3 Conn. 160.

[6] Story on Bailments, § 133.

[7] 2 Kent's Com. 568, note *e*.

[8] Bond *v.* Padelford, 13 Mass. 394; Merrill *v.* Curtis, 18 Maine, 272.

[9] Sibley *v.* Story, 8 Vermont, 15.

have the same effect as if the property had been restored to the defendant, and the sale had been made by him;[1] in which case we have seen that the sale would be valid.[2] A sale by a receiptor, with the assent of the attaching plaintiff, has the effect of dissolving the attachment.[3]

§ 370. The duties of the bailee are sufficiently apparent from what has been stated. He is bound to keep the property, and to return it on demand to the officer, and to take reasonable care of it while it is in his custody. He cannot be required to exercise more than ordinary care.[4] For any omission of duty in any of these particulars, he will be responsible to the officer. But this obligation to return the property to the officer is not in all cases absolute.[5] As has been before stated,[6] it depends upon the officer's liability for the property, either to the plaintiff, the defendant, the owner of it, or a subsequent attaching creditor, who, by placing a second writ in the hands of the same officer who seized the goods in the first place, has succeeded in obtaining a valid lien on the property. If the officer is not accountable for the goods to any one, he cannot make the bailee accountable to him.[7] When we come to consider the bailee's defences against an action by the officer on the receipt, we shall see more particularly what facts discharge his liability.

§ 371. The remedies of an officer for a disturbance of his possession of attached property are not confined to his retaking the property; for that would frequently be impracticable. As his special property continues as long as the attachment exists, he may maintain trover,[8] trespass,[9] and replevin,[10] for any violation of his possession during that period. And this, as well where the property has been bailed, as where it remains in his own hands; for, though he have not the actual keeping of the goods,

[1] Clark *v.* Morse, 10 New Hamp. 236.

[2] *Ante*, § 357; Denny *v.* Willard, 11 Pick. 519; Robinson *v.* Mansfield, 13 Ibid. 139.

[3] Eldridge *v.* Lancy, 17 Pick. 352.

[4] Cross *v.* Brown, 41 New Hamp. 283.

[5] Story on Bailments, § 132.

[6] *Ante*, §§ 354, 355.

[7] In Holt *v.* Burbank, 47 New Hamp. 164, the Supreme Court of New Hampshire said: "No special contract not under seal can be made which will extend the receiptor's liability beyond an indemnity to the officer; for the officer's special property depends upon his liability over."

[8] Ludden *v.* Leavitt, 9 Mass. 104; Badlam *v.* Tucker, 1 Pick. 389; Lowry *v.* Walker, 5 Vermont, 181; Lathrop *v.* Blake, 3 Foster, 46.

[9] Brownell *v.* Manchester, 1 Pick. 232; Badlam *v.* Tucker, Ibid. 389; Walker *v.* Foxcroft, 2 Maine, 270; Strout *v.* Bradbury, 5 Ibid. 313; Whitney *v.* Ladd, 10 Vermont, 165.

[10] Perley *v.* Foster, 9 Mass. 112; Gordon *v.* Jenney, 16 Ibid. 465.

yet the custody of the bailee being that of his servant or agent, and his special property being still in existence, he is regarded as having the lawful possession, so as to enable him to maintain an action for it.[1] Indeed, in Massachusetts, the officer, and not the bailee, must sue for bailed property;[2] but, as we have just seen, the weight of authority elsewhere is decidedly against that view.

§ 372. Where a bailee fails to redeliver property according to the terms of his contract, the officer may retake it, if accessible; but no case has met my observation holding that he is under obligation to do so; except one in Maine, where it was held, that the plaintiff's approval of the receiptor's ability did not exonerate the officer from making effort to find the property to respond to execution, or from the duty of bringing a suit on the receipt.[3] His right of action on the receipt accrues upon his demanding the property from the bailee, and the failure of the latter to deliver it.[4] In cases where the bailment is created by a deputy, his principal may claim to have made the bailment himself and may sustain an action in his own name upon the receipt;[5] or the deputy may sue thereon;[6] but it is not in virtue of his office, but of the personal contract between him and the bailee, that the deputy is enabled to maintain the action.[7] If the attachment was made by a person specially authorized to serve the writ, and a receipt given to him, an action on the receipt may be maintained in his name, after demand made upon the receiptor, by an officer holding the execution in the case.[8] It is not necessary, in order to the officer's maintaining an action on the receipt, that he should be still in office; but if, after his going out of office, the property be legally demanded of him by another officer, so as to make him liable for it, he may demand it of the bailee, and maintain an action on the receipt.[9]

§ 373. As in other cases of mere deposit, no right of action accrues to the bailor, until after a demand made upon the bailee,

[1] Brownell v. Manchester, 1 Pick. 232.
[2] Ludden v. Leavitt, 9 Mass. 104.
[3] Allen v. Doyle, 33 Maine, 420.
[4] Page v. Thrall, 11 Vermont, 230; Scott v. Whittemore, 7 Foster, 309.
[5] Davis v. Miller, 1 Vermont, 9; Baker v. Fuller, 21 Pick. 318; Smith v. Wadleigh, 18 Maine, 95.
[6] Spencer v. Williams, 2 Vermont, 209.
[7] Hutchinson v. Parkhurst, 1 Aikens, 258.
[8] Maxfield v. Scott, 17 Vermont, 634.
[9] Bradbury v. Taylor, 8 Maine, 130.

and a failure by him to return the goods; unless there has been a wrongful conversion, or some loss by gross negligence on his part;[1] and if the receiptor shall have died, there must be a demand upon his personal representative before the cause of action will be considered complete against his estate.[2] The necessity for a demand is not dispensed with by proving the receiptor's inability to redeliver;[3] but in such case the necessity for a demand at any particular place is dispensed with; it may be made wherever the officer finds the receiptor.[4] The bailee's liability is not fixed instantly on demand, but he is entitled to a reasonable time after demand to deliver the goods, and an action will not lie on the receipt, until there has been a neglect, after reasonable time, to comply.[5] If the bailee has suffered the property to go back into the defendant's possession, no demand is necessary.[6] And it was held, that a demand was not necessary, where the tenor of the receiptor's obligation was, that he should pay a sum of money, or keep the property safely, and redeliver it on demand; and, if no demand be made, that he should redeliver it within thirty days after rendition of judgment in the suit, at a place named, and notify the officer of the delivery.[7] It is not requisite that the demand be made by the officer who delivered the property to the bailee. The terms of the receipt are to be taken with reference to the subject-matter, and only import that the bailee holds the property in subjection to the attachment. Any officer, therefore, holding the execution in the case, sufficiently represents the bailor to make the demand, and a delivery to such officer would be in effect a delivery to the bailor.[8] But if another than the attaching officer make the demand, he must make known his authority to do so, or the demand and refusal will not be considered as evidence of a conversion.[9] A return on the execution that the officer had

[1] Story on Bailments, § 107; Bacon v. Thorp, 27 Conn. 251.

[2] Carpenter v. Snell, 37 Vermont, 255.

[3] Bicknell v. Hill, 33 Maine, 297.

[4] Gilmore v. McNeil, 46 Maine, 532.

[5] Jameson v. Ware, 6 Vermont, 610; Gilmore v. McNeil, 46 Maine, 532.

[6] Webster v. Coffin, 14 Mass. 196.

[7] Shaw v. Laughton, 20 Maine, 266; Humphreys v. Cobb, 22 Ibid. 380; Low v. Dunham, 61 Ibid. 566; Hunter v. Peaks, 74 Ibid. 363; Wentworth v. Leonard, 4 Cushing, 414; Hodskin v. Cox, 7 Ibid. 471.

[8] Davis v. Miller, 1 Vermont, 9; Stewart v. Platts, 20 New Hamp. 476; Cross v. Brown, 41 Ibid. 283.

[9] Walbridge v. Smith, Brayton, 173. In Phelps v. Gilchrist, 8 Foster, 266, BELL, J., said: "The receiptor is not bound, by law, or by his contract, to deliver the property to any deputy sheriff or other officer who may demand it. He is not bound to take notice of the authority of other officers to have possession of it, until it is distinctly made known to him. He has a right to be satisfied that the stranger, who comes to him to demand the goods, has a legal right to make the demand, so that a delivery to him will

demanded of the receiptor a delivery of the property is no evidence of a demand.[1]

§ 373 *a*. When an officer makes a demand on a bailee for the property entrusted to the latter, he must have with him the receipt taken by him for it; for it is the right of the bailee to have his contract returned to him, or to see it cancelled, when he discharges its obligation.[2] An officer not holding the receipt can make no legal demand for the property.[3]

§ 374. In the New England States, an attachment continues in force from the time of the levy until a certain period — in most, thirty days, in Connecticut, sixty days — after judgment in favor of the plaintiff. If, within the specified period after the judgment, the plaintiff do not cause execution to be issued, and levied on the attached property, if accessible, or, if not accessible, have it demanded within that time of the officer who attached it, by the officer having the execution, the lien of the attachment is lost.[4] The necessity for the issue of the execution within the prescribed period of time is not dispensed with by the fact that the attached property was stolen from the officer, and that he so returned on the writ. The plaintiff must at least show that he had entitled himself to levy on the property, if it had been faithfully kept.[5] If the execution be, within that time, placed in the hands of the officer who made the attachment, he being still in office, that will be sufficient notice to him that the plaintiff claims to have the attached goods applied to satisfy the execution.[6] And so far as the plaintiff's rights are concerned, the effect is the same if the execution be placed in the hands of the officer whose deputy made the attachment; for the law regards the officer and his deputy as the same.[7] When the execution is placed in the hands of another officer, it

discharge his obligations upon his receipt. Any such stranger who comes to him and calls for a delivery of the property without making known the authority he has to receive it, may be treated as a person without authority. The duty of making known his authority is on him who assumes to make a claim under it. The party who is called upon is under no duty to inquire whether he has authority or not."

[1] Bicknell *v.* Hill, 33 Maine, 297.

[2] Gilmore *v.* McNeil, 45 Maine, 599; Hinckley *v.* Bridgham, 46 Ibid. 450; Davis *v.* Maloney, 79 Ibid. 110.

[3] Davis *v.* Maloney, 79 Maine, 110.

[4] Howard *v.* Smith, 12 Pick. 202; Collins *v.* Smith, 16 Vermont, 9; Pearsons *v.* Tincker, 36 Maine, 384; Wetherell *v.* Hughes, 45 Ibid. 61; Stackpole *v.* Hilton, 121 Mass. 449.

[5] Blake *v.* Kimball, 106 Mass. 115.

[6] Humphreys *v.* Cobb, 22 Maine, 380.

[7] Humphreys *v.* Cobb, 22 Maine, 380; Ayer *v.* Jameson, 9 Vermont, 363.

is necessary that within that time demand should be made upon the attaching officer for the goods in order to hold him liable for them;[1] unless the goods are in the hands of a receiptor, and the attaching officer turns over the receipt to the plaintiff, who places it, with the execution, in the hands of a different officer; in that case no demand upon the officer who made the attachment is necessary.[2] If the officer holding a bailee's receipt go out of office while the action is pending, and judgment be rendered for the plaintiff, and execution be issued thereon and placed in the hands of his successor in office, it is the duty of the latter, within the time that the lien of the attachment continues, to demand of the former the attached goods, in order to hold him liable therefor; a demand by the latter on the receiptor is not sufficient; and if the receiptor had returned the goods to the defendant, the officer holding the receipt can maintain no action on it, for his liability for the goods has been discharged by the failure of his successor to demand the goods from him within the proper time.[3] It was attempted to hold the receiptor discharged, unless a demand for the goods was made upon him within the designated period after the judgment; but it was held, that if the officer's responsibility for the goods was fixed, so as to give him a right to demand them of the receiptor, the demand upon the latter might be made at any time before suit brought upon his receipt.[4] In Vermont, however, it is required that the demand shall be made within the life of the execution.[5]

§ 375. Care should be taken that the execution under which the demand is made of the bailee be regular; for it seems he is at liberty to inquire into that fact, and, where the action is against him for failing to deliver the property to be levied on to satisfy an irregular execution, he may take advantage of the irregularity to defeat the action. Thus, where an execution was placed in an officer's hands, returnable within sixty days, when by law it should have been returnable within one hundred and twenty days, and the officer, having demanded the goods of the bailee, brought suit on the receipt, alleging a demand *that the*

[1] Humphreys *v.* Cobb, 22 Maine, 380; Ayer *v.* Jameson, 9 Vermont, 363; Collins *v.* Smith, 16 Ibid. 9; Shepherd *v.* Hall, 77 Maine, 569.

[2] Moore *v.* Fargo, 112 Mass. 254.

[3] Shepherd *v.* Hall, 77 Maine, 569.

[4] Webster *v.* Coffin, 14 Mass. 196; Colwell *v.* Richards, 9 Gray, 374.

[5] Bliss *v.* Stevens, 4 Vermont, 88; Allen *v.* Carty, 19 Ibid. 65; Carpenter *v.* Snell, 37 Ibid. 255. The Supreme Court of this State once held that the demand must be made within thirty days after judgment. Strong *v.* Hoyt, 2 Tyler, 208.

execution might be levied on the goods, the declaration was, on demurrer, adjudged insufficient, because the execution was irregular, and the plaintiff had lost his claim on the goods by failing to take out a regular execution.[1]

§ 376. It does not appear that a personal demand upon the receiptor is necessary. If it were, it would be in his power to elude it, and thus avoid his responsibility. One who makes a contract to deliver specific articles on demand, should be always ready at his dwelling-house or place of business. A demand upon him personally, for goods which he could not carry about him, would be liable to more reasonable objection than a demand at his abode, during his absence; and, therefore, where a receiptor was absent from the State, it was determined that a demand made at his dwelling-house, of his wife, was sufficient.[2] If the receiptor promise to deliver the attached property "at such time and place as the officer shall appoint," a demand for its present delivery, made at the receiptor's dwelling-house, is a sufficient appointment of the time and place.[3]

§ 377. In New Hampshire, merely proving a demand upon the bailee for the goods, without bringing to his knowledge that they

[1] Jameson *v.* Paddock, 14 Vermont, 491.

[2] Mason *v.* Briggs, 16 Mass. 453. *Sed contra*, Phelps *v.* Gilchrist, 8 Foster, 266; where the Superior Court of New Hampshire take the opposite ground, and say: "A demand for these purposes is in its nature personal. It is a call by a person authorized to receive property, for its delivery, made upon the person who is bound to make such delivery. It must be such that the person required to deliver the property may at once discharge himself by yielding to the claim and giving up the property. Leaving a notice at a party's house is not of such a character. It gives no opportunity for the party to do what is demanded, and it would be a sufficient answer for the defendant to make in such a case, that though he was notified to give up the property, no opportunity was afforded him to comply with the notice. No reasonable construction can hold a receiptor bound to deliver the property at any time and at any place where he may happen to be, and still less at any place where, after a demand left at his house, he may happen to be able to find the attaching officer, or his agent. It forms no part of the contract of a depositary, a bailee to keep property without compensation, to carry the property to the depositor, in order to return it. It is entirely sufficient, that, having kept the property according to his contract in some reasonable and suitable place, he is there ready to deliver it. If a demand is made at any other place, the bailee is entitled to have reasonable time and opportunity to make the delivery at that place, and to require the party who calls for the property to be there to receive it. Any mode of making the demand which precludes the party from availing himself of these rights, is clearly insufficient, and therefore, the leaving a written demand at a receiptor's house is not evidence either of a breach of the receiptor's contract, or of a conversion of the property." See Gilmore *v.* McNeil, 46 Maine, 532; Sanborn *v.* Buswell, 51 New Hamp. 573.

[3] Moore *v.* Fargo, 112 Mass. 254.

are demanded for the purpose of being subjected to execution in the case in which they were attached, does not establish a conversion by the bailee. The court say: "The receiptor is in no default, unless it appears that the object of the demand is brought at the time to his notice; which by no means necessarily results from the delivery of a written notice. A great variety of circumstances may exist, which would prevent such a communication from being at once attended to. No inference is to be drawn against a man from his silence or inaction, unless it appears that he was aware of what was said or done to affect his interest. The burden is upon the party who relies upon such evidence to establish the fact that the party against whom he desires an inference to be drawn, knew and understood at the time the facts necessary to justify such inference." [1]

§ 377 *a*. Where one becomes a receiptor for property attached in several cases, a demand upon him for the property in one of those cases is sufficient to fix his liability in all of them, if judgment and execution shall have been obtained in them, so as to make the officer liable for the forthcoming of the property on execution.[2] In such case, if the receiptor deliver all the property in one suit, it will discharge his receipts in the others; or if, out of the avails of the property, he pay the judgment in one case, he cannot be held to pay the judgment in another case to any greater extent than the balance in his hands of the value of the goods attached.[3]

§ 378. Where several persons jointly become receiptors, a demand of the goods from any one of them is sufficient.[4] In such a case, where it was agreed "that a demand on any one of them should be binding on the whole," and one of them indorsed on the receipt an acknowledgment that "a due and legal demand" had been made on him by the officer, it was considered doubtful whether such an admission was conclusive upon the other receiptors.[5]

§ 379. Trover or replevin will lie against a receiptor, upon his refusal or neglect to comply with a demand for the delivery of the property;[6] but assumpsit seems to be quite as much re-

[1] Phelps *v.* Gilchrist, 8 Foster, 266. See Moore *v.* Fargo, 112 Mass. 254.

[2] Hinckley *v.* Bridgham, 46 Maine, 450.

[3] Haynes *v.* Tenney, 45 New Hamp. 183.

[4] Griswold *v.* Plumb, 13 Mass. 298.

[5] Fowles *v.* Pindar, 19 Maine, 420.

[6] Bissell *v.* Huntington, 2 New Hamp. 142; Cargill *v.* Webb, 10 Ibid. 199; Webb *v.* Steele, 13 Ibid. 230; Holt *v.*

sorted to in such cases. Trespass will not lie.[1] Where the officer who created the bailment lays a second attachment on the property, while in the bailee's hands, as we have seen he may do,[2] he may sustain the action, in virtue of such second attachment, though that under which the property was bailed may have been dissolved.[3]

§ 380. An acknowledgment by the bailee of a demand upon him by the officer, is sufficient evidence of a refusal to deliver the goods, without an accompanying admission of such refusal.[4] The delivery of goods by the bailee to another person under an adverse claim of title, or a conveyance thereof by mortgage to pay his own debts, is equivalent to a conversion.[5] But if the conversion be with the knowledge and assent of the officer, he cannot afterwards hold the receiptor liable on his contract.[6]

§ 381. Of what defences may the bailee avail himself in an action on his receipt? It may be stated as a general rule, that he is entitled to prove, as an excuse for not delivering the property, and as a defence to an action on the receipt, *any* state of facts which shows that the officer is not under any liability either to apply the property to the debt of the attaching creditor, or to return it to the debtor or other owner.[7] It is not competent for him to show that the officer who levied the attachment was not legally qualified to act as such, if he was fully in the exercise of the office *de facto*;[8] nor can he set up that the goods were not attached, as stated in the receipt, though the fact be that the attachment was a nominal one, and that the officer never did actually seize them;[9] nor can he deny that the goods were delivered to him by the officer;[10] nor can he impeach the judgment in the attachment suit,[11] or show informality or ir-

Burbank, 47 Ibid. 164; Sibley *v.* Story, 8 Vermont, 15; Pettes *v.* Marsh, 15 Ibid. 454; Dezell *v.* Odell, 3 Hill (N. Y.), 215; Stevens *v.* Eames, 2 Foster, 568.

[1] Sinclair *v.* Tarbox, 2 New Hamp. 135.

[2] *Ante*, §§ 269, 356.

[3] Whittier *v.* Smith, 11 Mass. 211; Whitney *v.* Farwell, 10 New Hamp. 9.

[4] Cargill *v.* Webb, 10 New Hamp. 199.

[5] Baker *v.* Fuller, 21 Pick. 318; Stevens *v.* Eames, 2 Foster, 568.

[6] Stevens *v.* Eames, 2 Foster, 568.

[7] Wright *v.* Dawson, 147 Mass. 384.

[8] Taylor *v.* Nichols, 19 Vermont, 104.

[9] Jewett *v.* Torrey, 11 Mass. 219; Lyman *v.* Lyman, Ibid. 317; Morrison *v.* Blodgett, 8 New Hamp. 238; Spencer *v.* Williams, 2 Vermont, 209; Lowry *v.* Cady, 4 Ibid. 504; Allen *v.* Butler, 9 Ibid. 122; Stimson *v.* Ward, 47 Ibid. 624; Bowley *v.* Angire, 49 Ibid. 41; Phillips *v.* Hall, 8 Wendell, 610; Webb *v.* Steele, 13 New Hamp. 230; Howes *v.* Spicer, 23 Vermont, 508.

[10] Spencer *v.* Williams, 2 Vermont, 209; Allen *v.* Butler, 9 Ibid. 122; Bell *v.* Shafer, 58 Wisconsin, 223.

[11] Brown *v.* Atwell, 31 Maine, 351; Burk

regularity in the attachment;[1] nor will his liability be affected by a mistake in the receipt, in the name of the defendant, by the omission of his given name, when the whole name was stated in the writ.[2] An amendment made by the plaintiff in the action in which the property was attached, but which did not tend to increase the liability of the defendant, will not discharge the receiptor from his accountability;[3] but where, after an attachment, an additional plaintiff was introduced into the suit, it was held, that, as the officer could not be made liable for the property to the plaintiff so brought in, he could not maintain an action on the receipt.[4] A discharge of the defendant in bankruptcy, after judgment against him in the attachment suit, will not discharge the bailee;[5] even if the petition in bankruptcy was filed before judgment was rendered;[6] nor will the commitment of the debtor on execution, after demand made on the receiptor for the goods, and his failure to deliver them, though the plaintiff bring suit and recover judgment against the debtor and his surety, for an escape, on a bond given by them for the prison limits;[7] nor will the fact that the defendant has an execution against the plaintiff for a larger amount than that under which the goods are demanded;[8] nor will an agreement between the plaintiff and the defendant in the attachment suit, that the former shall not enforce the receipt, and a forbearance accordingly to enforce it;[9] nor will the fact that after failing to comply with the demand of the officer within a proper time, the bailee at a subsequent time showed the officer the property, and told him to take it;[10] nor will the fact that the plaintiff, after he obtained judgment and execution, received from the receiptor the proceeds of a sale of the attached property, made by the latter without the knowledge of the defendant or the officer.[11]

The question has arisen, whether a bailee can set up as a defence to an action on his receipt, that the property was not by law subject to attachment; and it has been held to depend upon the officer's liability to the defendant for a return of the property

v. Webb, 32 Michigan, 173; Holcomb *v.* C. N. Nelson Lumber Co., 39 Minnesota, 342.

[1] Drew *v.* Livermore, 40 Maine, 266. See Stevens *v.* Bailey, 58 New Hamp. 564.

[2] Hunter *v.* Peaks, 74 Maine, 363.

[3] Smith *v.* Brown, 14 New Hamp. 67; Miller *v.* Clark, 8 Pick. 412; Laighton *v.* Lord, 9 Foster, 237; Hunter *v.* Peaks, 74 Maine, 363.

[4] Moulton *v.* Chapin, 28 Maine, 505.

[5] Smith *v.* Brown, 14 New Hamp. 67.

[6] Towle *v.* Robinson, 15 New Hamp. 408; Lamprey *v.* Leavitt, 20 Ibid. 544.

[7] Twining *v.* Foot, 5 Cushing, 512.

[8] Jenney *v.* Rodman, 16 Mass. 464.

[9] Ives *v.* Hamlin, 5 Cushing, 534.

[10] Scott *v.* Whittemore, 7 Foster, 309; Hill *v.* Wiggin, 11 Ibid. 292.

[11] Torrey *v.* Otis, 67 Maine, 573.

to him. If he is so liable, the bailee cannot make such a defence;[1] but if the bailee gave the property back into the possession of the defendant, the officer is no longer liable to the latter for it, and the bailee may discharge his liability to him by showing that the property was exempt by law from attachment.[2] In the cases in which these positions were taken, the receipts were merely an engagement to deliver to the officer certain property attached by him, — a simple bailment. But in a case where the receiptors agreed in the receipt that the property attached was the defendant's, and was of a specified value, and that they would on demand deliver the property to the officer, or, in case of their neglecting or refusing to deliver it, would pay to him on demand the amount of debt and costs which should be recovered in the suit; it was held, that the receiptors could not set up as a defence to an action by the officer on the receipt, either that the property was not the defendant's, or that it was not subject to attachment.[3] And where a mail wagon and horses, which were in use upon a mail route in carrying the mail, were attached and delivered to a receiptor, who was afterwards sued on his receipt; it was held, that the attachment was illegal; that the officer was not liable to the creditor for the property; and that the bailee might set up the illegality of the attachment as a defence against his receipt.[4]

§ 382. If an officer, after having delivered property to a receiptor, seize it under another attachment, and take it out of the custody of the receiptor, this puts an end to the contract of bailment, and the officer cannot recover on the receipt;[5] but this result does not follow the seizure of the property by another officer.[6] But if the bailee himself, after the bailment, levy an attachment on the goods and sell them, this is no defence to the action on his receipt, nor can it be set up in mitigation of damages.[7] Where, however, before the bailment, the property had been attached in another suit against the same defendant, and upon the execution in that case had been seized and sold, the bailee delivering it to the officer for that purpose, it was held, that, as the first attaching officer had a better title to it

[1] Smith v. Cudworth, 24 Pick. 196.

[2] Thayer v. Hunt, 2 Allen, 449; Stone v. Sleeper, 59 New Hamp. 205.

[3] Bacon v. Daniels, 116 Mass. 474; Stevens v. Stevens, 39 Conn. 474. This is the same ground as that taken in other States in regard to defences against bail bonds. See *ante*, § 323.

[4] Harmon v. Moore, 59 Maine, 428.

[5] Beach v. Abbott, 4 Vermont, 605; Rood v. Scott, 5 Ibid. 263.

[6] Rider v. Sheldon, 56 Vermont, 459.

[7] Whittier v. Smith, 11 Mass. 211.

than the second, the latter could not maintain an action on the receipt taken by him. And it was considered to be immaterial whether the first attachment was fraudulent or not, if the bailee was not a party to the fraud; or whether the bailee had notice or not that the plaintiff in the suit in which he became bailee, intended to contest the first attachment on the ground of fraud.[1]

§ 383. Where a receipt for attached property bound the makers to return the property, or, at their choice, to pay the officer certain sums, when called for, after judgment should be recovered on the demands on which the property was attached; and it was shown that soon after the execution of the receipt the property was sold by the officer, with the consent of the plaintiff, defendant, and receiptor, and the money paid into the hands of the receiptor; it was held, that the sale was an implied rescinding of the contract, and that the officer could neither maintain trover for the property, nor assumpsit upon the receipt for the money.[2]

§ 384. A dissolution of the attachment, and a subsequent delivery of bailed property by the bailee to the person entitled to it, discharge the bailee from liability to the officer. Therefore, where, under the insolvent law of Massachusetts, an assignment by an insolvent is declared to vest all his property in the assignees, "although the same may be attached on *mesne* process as the property of said debtor; and such assignment shall be effectual to pass all the said estate, and dissolve any such attachment;" and a defendant, after an attachment and bailment of his property, made an assignment in insolvency, and after the assignment the bailee delivered the property over to the assignees; it was held, that he was not liable on his receipt.[3] So, where, by the operation of § 14 of the general bankrupt act of 1867, an attachment taken out within four months previous to the act of bankruptcy of the defendant, was dissolved, it was held, that the officer could not enforce a receiptor's obligation for the return of the property.[4]

§ 385. Where a horse was attached and delivered to a bailee, and before the expiration of the time limited for its delivery it

[1] Webster *v.* Harper, 7 New Hamp. 594.

[2] Kelly *v.* Dexter, 15 Vermont, 310.

[3] Sprague *v.* Wheatland, 8 Metcalf, 416; Butterfield *v.* Converse, 10 Cushing, 317; Shumway *v.* Carpenter, 13 Allen, 68.

[4] Mitchell *v.* Gooch, 60 Maine, 110.

died, without any fault of the bailee, he was held not to be answerable for its value.[1] In such case no fault on his part is to be presumed. The presumption is the other way; and if it is sought to charge him for fault, such fault must be proved.[2] But where the bailee permitted the horse to be sold by the defendant to a third person, who took the same into his possession, and the horse then died, its death was held to be no defence to an action on the bailee's receipt.[3]

§ 386. An officer is not bound to accept from a receiptor a different article from that attached, though it be of the same description, quality, and quantity.[4] And if a receiptor, when the attached property is demanded of him by the officer, deliver to him other like property, which is sold by the officer, and being insufficient, the officer sue him on the receipt, it is no defence for the receiptor to say that the property delivered was in lieu of that attached, unless the officer expressly agreed it should be so received. In such case it is the duty of the bailee to redeliver the same property he had received, or pay the value of it. If he substituted other property, which was sold on the execution, he would be liable still for the property attached; but the proceeds of that sold would extinguish that liability *pro tanto*.[5]

§ 387. Where a partnership gave a receipt for property which had been attached on a writ against a former partnership, composed in part of the same persons, the debts of which the receiptors, as successors of the former firm, had agreed to pay, the receiptors, when sued on the receipt, were not allowed to contest its validity on the ground that the property of the new partnership was not liable to attachment upon a demand against the old firm.[6]

§ 388. We have seen[7] that the right of the officer to retake bailed property from the possession of the bailee depends on his liability therefor, either to the plaintiff, the defendant, or another creditor of the defendant, who has, through the same

[1] *Ante*, § 341. Shaw *v.* Laughton, 20 Maine, 266.

[2] Cross *v.* Brown, 41 New Hamp. 283.

[3] Thayer *v.* Hunt, 2 Allen, 449.

[4] Scott *v.* Whittemore, 7 Foster, 309; Anthony *v.* Comstock, 1 Rhode Island, 454; Gilmore *v.* McNeil, 46 Maine, 532.

[5] Sewell *v.* Sowles, 13 Vermont, 171; Smith *v.* Mitchell, 31 Maine, 287.

[6] Morrison *v.* Blodgett, 8 New Hamp. 238.

[7] *Ante*, §§ 353, 354, 355.

officer, laid a second attachment on the property, while it was still in the bailee's possession. The same rule applies where the officer sues on the receipt; whether the receipt be a simple contract or a sealed instrument.[1] The law recognizes the bailee's right to permit the property to go back into the defendant's possession; and where he does so, considers his receipt, in effect, as a contract to pay the demand upon which the property was attached;[2] and it is, therefore, well settled that, in such case, the bailee's liability to the officer, where there is only one attachment, depends altogether upon the officer's liability to the plaintiff; and that, if the officer be no longer liable to the plaintiff, he cannot maintain an action on the receipt.[3] And where the officer, no longer liable to either plaintiff or defendant in the action in which the bailment was created, seeks to enforce the receipt for the benefit of a second attaching creditor, it is a sufficient defence, that, before the second attachment was made, the property had gone into the defendant's possession, and that the first attachment was satisfied before the officer demanded the property of the bailee.[4]

§ 389. If an officer attach property as the defendant's he may notwithstanding show, in an action by the plaintiff against him for not having it in hand to satisfy the execution in the case, that it did not in fact belong to the defendant.[5] This proceeds from the obvious principle, that the officer shall not be responsible to the plaintiff for not doing that which he was under no legal obligation to do; and as he is under no obligation to keep the property of one man to answer the debt of another, he cannot be made liable for not doing so. If, then, in such a case the property has been bailed, it being, as we have seen, a well-settled principle that the bailee's liability to the officer depends upon the officer's accountability for the property to some one else, it follows, that, where the property is not the defendant's, the officer should not be allowed to hold the receiptor answerable

[1] Clark *v.* Gaylord, 24 Conn. 484; Fowler *v.* Bishop, 31 Ibid. 560; Drayton *v.* Merritt, 33 Ibid. 184; Sanford *v.* Pond, 37 Ibid. 588.

[2] Whitney *v.* Farwell, 10 New Hamp. 9.

[3] Fisher *v.* Bartlett, 8 Maine, 122; Carr *v.* Farley, 12 Ibid. 328; Sawyer *v.* Mason, 19 Ibid. 49; Moulton *v.* Chapin, 28 Ibid. 505; Plaisted *v.* Hoar, 45 Ibid. 380; Harmon *v.* Moore, 59 Ibid. 428; Shepherd *v.* Hall, 77 Ibid. 569; Lowry *v.* Stevens, 8 Vermont, 113; Jameson *v.* Paddock, 14 Ibid. 491; Frost *v.* Kellogg, 23 Ibid. 308.

[4] Whitney *v.* Farwell, 10 New Hamp. 9; Hill *v.* Wiggin, 11 Foster, 292.

[5] *Ante*, § 294; Fuller *v.* Holden, 4 Mass. 498; Denny *v.* Willard, 11 Pick. 519; Canada *v.* Southwick, 16 Ibid. 556; Dewey *v.* Field, 4 Metcalf, 381; Sawyer *v.* Mason, 19 Maine, 49; Burt *v.* Perkins, 9 Gray, 317.

for it, if it has gone into the possession of the rightful owner. The mere fact, that, at the time of the attachment, the property did not belong to the defendant, will not, of itself, be a sufficient defence against the bailee's liability on his receipt; for the officer, being liable to the true owner, must obtain possession of the property in order to restore it.[1] But where it appears not only that the property belonged, but has been delivered, to a third person, it is unquestionable that the officer cannot maintain an action against the bailee for it.[2] In Louisiana, it would seem not to be necessary to show that the property had gone back into the hands of the actual owner, if it was in the hands of those who were entitled to the possession of it; as where it was consigned by the owner to commission merchants, and the latter took it from the possession of the officer, upon executing a bond to return it; there, the commission merchants, being entitled to retain their possession, which was in legal contemplation the possession of the owner, would not be required to show that the owner had the actual custody of the property.[3]

§ 390. Where, however, in a receipt which admitted the property to have been attached as the defendant's, the following clause was embodied, "and we further agree that this receipt shall be conclusive evidence against us as to our receipt of said property, its value before mentioned, and our liability under all circumstances to said officer for the full sum above mentioned;" — it was held, that the receiptors would not be allowed to avoid their liability, by proving that the property was not the defendant's.[4]

§ 391. Is the receiptor estopped by his receipt from asserting property in himself in the goods attached? This depends upon the circumstances under which he undertakes to assert it. If sued by the defendant for a return of the goods, after dissolution of the attachment, his receipt does not conclude him from showing that they belonged to himself, and not to the defendant.[5] If the receiptor, after having delivered up the property according

[1] Fisher *v.* Bartlett, 8 Maine, 122; Scott *v.* Whittemore, 7 Foster, 309; Clark *v.* Gaylord, 24 Conn. 484.

[2] Learned *v.* Bryant, 13 Mass. 224; Fisher *v.* Bartlett, 8 Maine, 122; Sawyer *v.* Mason, 19 Ibid. 49; Stanley *v.* Drinkwater, 43 Ibid. 468; Quine *v.* Mayes, 2 Robinson (La.), 510; Lathrop *v.* Cook, 14 Maine, 414; Scott *v.* Whittemore, 7 Foster, 309; Clark *v.* Gaylord, 24 Conn. 484; Burt *v.* Perkins, 9 Gray, 317; Mason *v.* Aldrich, 36 Minnesota, 283.

[3] Quine *v.* Mayes, 2 Robinson (La.), 510.

[4] Penobscot Boom Corporation *v.* Wilkins, 27 Maine, 345.

[5] Barron *v.* Cobleigh, 11 New. Hamp. 557.

to his contract, bring replevin against the officer for it, he is not estopped from maintaining the action, by reason of having given the receipt, and therein having acknowledged that the articles attached were the property of the defendant; for the engagement was performed, and the estoppel could not be permitted to extend beyond the terms and duration of the contract.[1]

§ 392. But as between him and the officer, in an action by the latter on the receipt, where the receipt admits the goods to be the defendant's, or to have been attached as his, it has been repeatedly held, that the bailee is estopped by the receipt from setting up property in himself.[2] And so in New York, where the receipt contained no such admission, but simply an acknowledgment of having received the property, and a promise to redeliver it at a certain time and place.[3] Later cases, however, qualify this general rule. While it is conceded on all hands that a receiptor who conceals from the officer his ownership of the property and suffers it to be attached as the defendant's, thereby preventing the officer, perhaps, from attaching other property, is precluded, when sued on the receipt, from setting up property in himself; yet it is considered to be materially different where he makes known to the officer, at the time of the attachment, that the property is his, and not the defendant's. In such case it is held in Massachusetts, that the bailee may set up property in himself, not as a bar to the action but as showing the officer entitled only to nominal damages;[4] while in Vermont and in California it is considered to constitute a full defence.[5] And in New Hampshire, the giving of a receipt for the property by the owner of it, is no bar to an action of trespass by him against the attaching officer.[6]

§ 393. The only remaining topic in this connection is the measure of the officer's recovery in the action against the bailee. Whether he shall recover only nominal damages, or the full

[1] Johns *v.* Church, 12 Pick. 557; Lathrop *v.* Cook, 14 Maine, 414.

[2] Johns *v.* Church, 12 Pick. 557; Robinson *v.* Mansfield, 13 Ibid. 139; Bursley *v.* Hamilton, 15 Ibid. 40; Dewey *v.* Field, 4 Metcalf, 381; Sawyer *v.* Mason, 19 Maine, 49; Penobscot Boom Corporation *v.* Wilkins, 27 Ibid. 345; Barron *v.* Cobleigh, 11 New Hamp. 557; Drew *v.* Livermore, 40 Maine, 266; Potter *v.* Sewall, 54 Ibid. 142.

[3] Dezell *v.* Odell, 3 Hill (N. Y.), 215; People *v.* Reeder, 25 New York, 302; Cornell *v.* Dakin, 38 Ibid. 253.

[4] Bursley *v.* Hamilton, 15 Pick. 40.

[5] Adams *v.* Fox, 17 Vermont, 361; Halbert *v.* Soule, 57 Ibid. 358; Bleven *v.* Freer, 10 California, 172. See Jones *v.* Gilbert, 13 Conn. 507.

[6] Morse *v.* Hurd, 17 New Hamp. 246.

value of the property, or the amount of the plaintiff's demand, not exceeding the value of the property, is to be determined by the facts of each case. Where, at the institution of his suit, he has a full right of action against the receiptor, but afterward, and before obtaining judgment, he is, by the plaintiff's failure to take the needful steps, released from responsibility to him, and at the same time the property has gone back into the defendant's possession; as he is no longer liable to either plaintiff or defendant, he can recover only nominal damages against the receiptor.[1]

§ 394. Where the value of the property is stated in the receipt, it is not to be considered as descriptive of the property, but as a part of the contract, and as constituting a stipulation for a rule of damages against the receiptor in case of a non-delivery of the property; and hence an officer will not be allowed, in an action on the receipt, whether in form *ex contractu* or *ex delicto*, to give evidence that the property was of greater value than that stated in the receipt;[2] and of course the receiptor cannot give evidence that it was of less value.[3] In such case, where all the articles are valued at a gross sum, the receiptor cannot avoid his liability, *pro tanto*, by tendering to the officer part of the goods, unless he has a reasonable excuse for not delivering the residue.[4] But if the value of each article is separately stated in the receipt, and the bailee tenders part of them to the officer, the latter can recover only for the articles not tendered, according to their admitted value.[5]

§ 395. Whether the officer can recover the full value of the property, depends upon his being liable to that extent for it to some one else. If the amount of the judgment in the attachment suit be greater than the value of the property, then the measure of the recovery is the value of the property.[6] If the property has gone back to the defendant's possession, and its value exceeded the amount of the judgment in the attachment suit, the rule of damages is the amount of the judgment and

[1] Norris *v.* Bridgham, 14 Maine, 429; Moulton *v.* Chapin, 28 Ibid. 505; Farnham *v.* Cram, 15 Ibid. 79.

[2] Parsons *v.* Strong, 13 Vermont, 235; Drown *v.* Smith, 3 New Hamp. 299; Remick *v.* Atkinson, 11 Ibid. 256; Jones *v.* Gilbert, 13 Conn. 507; Stevens *v.* Stevens, 39 Ibid. 474.

[3] Smith *v.* Mitchell, 31 Maine, 287.

[4] Drown *v.* Smith, 3 New Hamp. 299; Remick *v.* Atkinson, 11 Ibid. 256.

[5] Remick *v.* Atkinson, 11 New Hamp. 256.

[6] Cross *v.* Brown, 41 New Hamp. 283.

costs;[1] but if the amount of the attachments upon it is less than the value stipulated, the recovery cannot be for a greater amount than that necessary to satisfy the attachments.[2] But where the bailee has converted the property to his own use, or still holds it, the officer is not only authorized, but obliged, to take judgment for the full value; and if he take it for less, he will be liable to the defendant for the deficiency.[3]

§ 395 *a*. It was attempted, in New Hampshire, but without success, to modify the rule stated in the next preceding section, that if the amount of the judgment in the attachment suit be greater than the value of the property, then the measure of the recovery is the value of the property. The case was this: An officer levied an attachment on a quantity of personal property which was claimed by a third person, who obtained a receiptor for it, and in the receipt the property was valued in gross at $800. The claimant afterwards disposed of the whole property. Judgment having been obtained in the attachment suit for $898.83, the officer brought trover against the bailee for a part of the articles; and it was agreed between the parties, for the purposes of the case, that the whole property embraced in the receipt was worth much more than $800, and that the articles for which the officer sued the bailee were also worth much more than that sum. The officer claimed that he was entitled to recover, either the full value of the articles for which he sued, not exceeding the amount of the judgment in the attachment suit, or the amount stated in the receipt as the value of all the property attached, with interest after demand. On the other hand, the bailee claimed that the valuation stated in the receipt was conclusive on the officer, and that he was entitled to recover only such proportion of the $800 and interest as the property for which he brought trover bore to the whole property receipted for. The court held, that the bailee's position was not tenable, and that the officer should recover the amount of the value stated in the receipt.[4]

§ 396. The judgment which an officer may recover against a receiptor is merely collateral to the debt due from the defendant to the plaintiff in the attachment, and for the benefit and secur-

[1] Cross *v.* Brown, 41 New Hamp. 283.
[2] Farnham *v.* Cram, 15 Maine, 79; Hunter *v.* Peaks, 74 Ibid. 363.
[3] Bissell *v.* Huntington, 2 New Hamp. 142; Whitney *v.* Farwell, 10 Ibid. 9; Sawyer *v.* Mason, 19 Maine, 49; Catlin *v.* Lowrey, 1 D. Chipman, 396.
[4] Spear *v.* Hill, 52 New Hamp. 323.

ity of the officer; and when the defendant has no claim on him, and his obligation to the plaintiff is removed, by the payment of the debt for which the attachment issued, the judgment becomes a mere dead letter, and cannot be enforced.[1] But if the debt be satisfied *after* the officer has sued on the receipt, that will not bar his action, but he will still be entitled to recover nominal damages.[2]

[1] Paddock *v.* Palmer, 19 Vermont, 581; Brown *v.* Crockett, 22 Maine, 537.

[2] Stewart *v.* Platts, 20 New Hamp. 476.

CHAPTER XV.

ATTACHMENTS IMPROVIDENTLY ISSUED, AND THE MEANS OF DEFEATING THEM.

§ 397. ISSUING an attachment improvidently is to be distinguished from issuing it irregularly. In the latter case, the defect appears on the face of the proceedings, and may be taken advantage of by a motion to quash or dissolve. In the former, all the preliminary steps may be regular, and yet the attachment have been improvidently granted, because the allegations on which it issued were untrue.[1]

§ 398. Where, as in the New England States, under the ordinary process of summons an attachment may be made, if the plaintiff so directs, it is of no importance to the defendant to be allowed to impeach the attachment for improvidence; but where, as elsewhere is universally the case, an affidavit alleging certain facts is required to authorize an attachment to issue, this privilege is of great value to defendants, who might otherwise be remedilessly ruined by the recklessness or bad faith of creditors; and it is in many States secured to them by statute.

§ 399. There can hardly be room for doubt that, without the aid of express statutory provisions, a defendant may, in one form or another, contest the truth of the grounds alleged by the plaintiff for obtaining the attachment. In Mississippi,[2] Arkansas,[3] and Texas,[4] it is not so; but, as the following review will

[1] Lovier *v.* Gilpin, 6 Dana, 321.

[2] Smith *v.* Herring, 10 Smedes & Marshall, 518.

[3] Taylor *v.* Ricards, 9 Arkansas, 378; Mandel *v.* Peet, 18 Ibid. 236.

[4] Cloud *v.* Smith, 1 Texas, 611; Bateman *v.* Ramsey, 74 Ibid. 589. In Alabama, it was at one time held that the allegations of the affidavit were traversable, and might be investigated and decided by a jury. Brown *v.* Massey, 3 Stewart, 226. This opinion, however, was afterwards in effect overruled in Middlebrook *v.* Ames, 5 Stewart & Porter, 158. Subsequently, by statute, the defendant was precluded from contesting the truth of the affidavit; and though the statute referred only to original attachments, it was held, in Jones *v.* O'Donnell, 9 Alabama, 695, to apply as well to an ancillary attachment, taken out in, and in aid of, a suit already instituted by summons.

exhibit, this doctrine is upheld in a number of States. The modes by which the contest may be instituted are different, as will be seen in the succeeding sections, setting forth as well those used without as those used with statutory authority.

§ 399 *a*. The right of the defendant to the dissolution of an attachment is not affected by the fact that later attachments have also been levied. He is entitled to his opportunity to impeach the cases, one by one, as they were instituted.[1] Nor is his right to traverse the allegations of the affidavit lost by his having made an assignment of all his property for the benefit of his creditors: he still has an interest in having his property equally and justly distributed among his creditors.[2]

§ 400. In New York, prior to the adoption of the Code of Procedure, the mode of defeating an attachment improvidently issued, was by *supersedeas*, obtained from the Supreme Court, on affidavits filed by the defendant, showing the falsity of that on which the writ was obtained. That court, at an early day, asserted its jurisdiction in such cases,[3] and afterwards constantly exercised it. Therefore, where an attachment was obtained on an allegation that the defendant had departed the State with the intent of avoiding arrest, and of defrauding his creditors, a *supersedeas* was awarded, upon the relation of the defendant, showing that he had not departed the State, but had openly made a journey within it.[4] So, where from the evidence given by the defendants, it appeared that they had not absconded, and were not concealed, at the time the petition for an attachment was presented.[5]

In this State, since the adoption of the Code of Procedure, the courts have asserted their inherent right to control their own process, and to inquire into the grounds upon which it has issued, and to receive proofs in relation thereto, on special motion, though the Code gives no authority for such a proceeding.[6]

On such a motion the defendant may introduce affidavits against, and the plaintiff supplemental affidavits in support of, the ground of attachment sworn to in the first instance; and if by all the affidavits sufficient appears to warrant the issuing of

[1] Schall *v.* Bly, 43 Michigan, 401; Sheldon *v.* Stewart, Ibid. 574.
[2] Keith *v.* Armstong, 65 Wisconsin, 225.
[3] Lenox *v.* Howland, 3 Caines, 323. See Orton *v.* Noonan, 27 Wisconsin, 572.
[4] *Ex parte* Chipman, 1 Wendell, 66.
[5] Matter of Warner, 8 Wendell, 424.
[6] Morgan *v.* Avery, 7 Barbour, 656; Genin *v.* Tompkins, 12 Ibid. 265.

the attachment, the court will not set it aside for any insufficiency in the affidavit on which it issued.[1]

A motion to vacate an attachment because the ground upon which it was issued was not true, must, in that State, be made at the first opportunity, or an excuse be shown for not so making it. It comes too late after judgment.[2] But where it was made before judgment, and was sent by the court to a referee to hear the proofs, and report his opinion thereon, and before his report was made judgment was entered, it was held, that the motion might be heard and passed upon after the entry of the judgment.[3]

§ 401. In Pennsylvania, it was early held, that the court would make inquiry in attachment cases into the plaintiff's cause of action, as in cases of *capias*, and where a sufficient cause did not appear, would dissolve the attachment.[4] This right of inquiry in such cases is now firmly established in that State, and the practice has been regulated by several reported decisions.[5] It is the practice there, too, to allow the defendant in a domestic attachment to show by affidavits that he had not absconded, as alleged, and upon the same being satisfactorily shown, to dissolve the attachment. In a case of this description, the court said, "The affidavit on which a domestic attachment is grounded, has never been held to be conclusive; such a doctrine would be attended with the most pernicious consequences;" and intimated that the plaintiff might sustain his affidavit by contrary proofs to those presented by the defendant.[6]

§ 402. In New Jersey, the power and duty of the court to inquire into the misuse and abuse of this process, was declared to rest on the most ancient and established principles, and to be as applicable to writs of attachment as to any other process. There the truth of the allegations on which the writ issues is brought up on motion to dissolve the attachment, sustained by affidavits.[7]

[1] Cammann *v.* Tompkins, 1 Code Reports, 12; St. Amant *v.* De Beixcedon, 3 Sandford Sup. Ct. 703.

[2] Lawrence *v.* Jones, 15 Abbott Pract. 110; Swezey *v.* Bartlett, 3 Ibid. N. S. 444. See Foster *v.* Dryfus, 16 Indiana, 158.

[3] Thompson *v.* Culver, 15 Abbott Pract. 97; 38 Barbour, 442; 24 Howard Pract. 286.

[4] Vienne *v.* McCarty, 1 Dallas, 165.

[5] Vienne *v.* McCarty, 1 Dallas, 165, note *a*. See Ferris *v.* Carlton, 8 Philadelphia, 549.

[6] Boyes *v.* Coppinger, 1 Yeates, 277.

[7] Branson *v.* Shinn, 1 Green, 250; City Bank *v.* Merrit, Ibid. 131; Day *v.* Bennett, 3 Harrison, 287; Shadduck *v.* Marsh, 1 Zabriskie, 434; Phillipsburgh Bank *v.* Lackawanna R. R. Co., 3 Dutcher, 206.

§ 403. In Maryland, it was decided, that every fact is cognizable by the court which would show that the attachment issued improvidently; and evidence *dehors* the proceedings might be resorted to, and proof made to the court,[1] either under a motion to quash or under a plea.[2]

§ 404. In South Carolina, the defendant may contest the allegations in the affidavit, and if successful in disproving them, the attachment will be dissolved. As to the mode of accomplishing this, the decisions appear not to be quite consistent. In a case of domestic attachment, it was held, that "a shorthand method of quashing by motion" was inadmissible.[3] Afterwards, in a case of foreign attachment, this course was allowed;[4] though in a subsequent case it was considered that, whatever may have been the practice, a judge ought, in a doubtful case, to refuse a motion to quash an attachment by an affidavit; and the propriety of a plea in abatement, and a trial of the issue by a jury, was recognized.[5] But a motion to dissolve an attachment, supported by affidavits, was heard before the judge, and the propriety of that mode of proceeding was not questioned.[6]

§ 405. In Tennessee,[7] Kentucky,[8] Indiana,[9] and Illinois,[10] the defendant may plead in abatement, traversing the allegations of the affidavit.

§ 406. The preceding sections show the views of this subject entertained by the courts of the several States in which it has been considered, unconnected with statutory provisions. Before proceeding to refer to such provisions in other States, and the decisions thereunder, it should be remarked, that in whatever mode a contest of the truth of the affidavit may be allowed, it should precede the defendant's appearance and plea to the ac-

[1] Campbell *v.* Morris, 3 Harris & McHenry, 535.

[2] Lambden *v.* Bowie, 2 Maryland, 334; Gover *v.* Barnes, 15 Ibid. 576; Hardesty *v.* Campbell, 29 Ibid. 533.

[3] Havis *v.* Trapp, 2 Nott & McCord, 130.

[4] Wheeler *v.* Degnan, 2 Nott & McCord, 323.

[5] Shrewsbury *v.* Pearson, 1 McCord, 331.

[6] Clausseen *v.* Easterling, 19 South Carolina, 515.

[7] Harris *v.* Taylor, 3 Sneed, 536; Isaacks *v.* Edwards, 7 Humphreys, 465; Dunn *v.* Myres, 3 Yerger, 414.

[8] Meggs *v.* Shaffer, Hardin, 65; Moore *v.* Hawkins, 6 Dana, 289; Lovier *v.* Gilpin, Ibid. 321.

[9] Voorhees *v.* Hoagland, 6 Blackford, 232; Abbott *v.* Warriner, 7 Ibid. 573; Excelsior Fork Co. *v.* Lukens, 38 Indiana, 438.

[10] Bates *v.* Jenkins, 1 Illinois (Breese), Appendix, 25.

tion. If he have already pleaded to the action, or do so at the same time that he pleads to the affidavit, or afterwards, he cannot controvert the affidavit.[1] But this rule is not applicable where the plea merely traverses the allegations of the affidavit, as well that averring indebtedness as that alleging ground of attachment. This is not pleading to the action.[2] In no case will a defendant be allowed to give evidence to contradict the affidavit, unless he have pleaded to it in abatement, where that is the mode of contesting it.[3] And in Illinois, applying the common-law rule in regard to pleas in abatement, it was held, that this plea could not be filed after a continuance.[4]

§ 406 *a*. Where an attachment has been vacated by the court, after an inquiry into the merits of the ground upon which it was issued, another attachment by the same party, on the same ground, where no new facts are presented, cannot be sustained. "The defendant is not to be continually vexed by the same application; nor are the same or different tribunals to hear and decide upon the same matters more than once."[5]

§ 407. A plea in abatement, where allowed, must directly and fully negative the allegations of the affidavit. Thus, where the affidavit stated that the defendant "was removing and about to remove his property from the State," and the defendant pleaded that "he was not removing from the State, nor was he removing his property from the State," it was, on demurrer, considered to be no answer to the affidavit.[6] But, where an affidavit contained several grounds of attachment, a general denial of the existence of any of the facts alleged was held sufficient.[7]

§ 408. In Louisiana, the defendant may prove in a summary way, after having given due notice in writing to the adverse party, that the allegations on which the order for attachment had been obtained, were false; in which case the attachment

[1] Meggs *v.* Shaffer, Hardin, 65; Lindsley *v.* Malone, 23 Penn. State, 24; Hatry *v.* Shuman, 13 Missouri, 547; Cannon *v.* McManus, 17 Ibid. 345; Green *v.* Craig, 47 Ibid. 90; Collins *v.* Nichols, 7 Indiana, 447; Sharkey *v.* Williams, 20 Missouri Appeal, 681; Haseltine *v.* Ausherman, 29 Ibid. 451. *Sed contra*, Hawkins *v.* Albright, 70 Illinois, 87.

[2] Sharkey *v.* Williams, 20 Missouri Appeal, 681.

[3] Moore *v.* Hawkins, 6 Dana, 289.

[4] Archer *v.* Claflin, 31 Illinois, 306.

[5] Schlemmer *v.* Myerstein, 19 Howard Pract. 412.

[6] White *v.* Wilson, 10 Illinois (5 Gilman), 21. See Wehle *v.* Kerbs, 6 Colorado, 167; McFarland *v.* Claypool, 128 Illinois, 397.

[7] Armstrong *v.* Blodgett, 33 Wisconsin, 284.

will be dissolved.[1] And it is not necessary that such a defence should be set up by plea or exception.[2] It is considered there, that the affidavit has a greater effect than merely enabling the party to obtain process against the defendant, and that in making proof under such a defence, the defendant must show enough to throw the burden of proof on the plaintiff;[3] and in a case where the evidence on behalf of the defendant effected no more than merely making the matter doubtful, it was decided that the attachment should not be dissolved.[4] In Nebraska, however, when the cause of attachment is denied by the defendant, the burden of proof is thrown upon the plaintiff, and if nothing appear to authorize greater credit to be given to his statements than to those of the defendant, the attachment will be discharged.[5] In Ohio, a denial by the defendant of the ground of attachment throws the burden of proof on the plaintiff.[6] And so in Pennsylvania, Virginia, Michigan, Illinois, Missouri, Florida, and Kansas.[7]

§ 409. In Missouri, the right conferred on the defendant by statute, to contest the truth of the plaintiff's affidavit, by a plea "in the nature of a plea in abatement," has given rise to a number of adjudications. The language of the statute is as follows: "In all cases where property or effects shall be attached, the defendant may file a plea, in the nature of a plea in abatement without oath, putting in issue the truth of the facts alleged in the affidavit, on which the attachment was sued out. Upon such issue, the plaintiff shall be held to prove the existence of the facts alleged by him, as the ground of the attachment; and if the issue be found for him, the cause shall proceed; but if it be found for the defendant, the suit shall be dismissed at the costs of the plaintiff."[8] In order to see the force of some of the cases to be cited from this State, it is necessary to mention here, that

[1] Louisiana Code of Practice, Art. 258.

[2] Read *v.* Ware, 2 Louisiana Annual, 498.

[3] Brumgard *v.* Anderson, 16 Louisiana, 341; Offut *v.* Edwards, 9 Robinson (La.), 90; Simons *v.* Jacobs, 15 Louisiana Annual, 425.

[4] Moore *v.* Angiolette, 12 Martin, 532.

[5] Ellison *v.* Tallon, 2 Nebraska, 14; Otis W. Co. *v.* Benedict, 25 Ibid. 372.

[6] Coston *v.* Paige, 9 Ohio State, 397.

[7] Butcher *v.* Fernan, 1 Luzerne Legal Register, 401; Easterline *v.* Jones, 2 Ibid. 121; Wright *v.* Rambo, 21 Grattan, 158; Sublett *v.* Wood, 76 Virginia, 318; Brown *v.* Blanchard, 39 Michigan, 790; Macumber *v.* Beam, 22 Ibid. 395; Genesee Sav. B'k *v.* Michigan B. Co., 52 Ibid. 164; Towle *v.* Lamphere, 8 Bradwell, 399; Canova *v.* Colby, 16 Florida, 167; McPike *v.* Atwell, 34 Kansas, 142; Becker *v.* Langford, 39 Ibid. 35; Strauss *v.* Abraham, 32 Federal Reporter, 310.

[8] Revised Statutes of Missouri of 1845, pp. 139, 140.

the affidavit for an attachment must state that the affiant "has good reason to believe, and does believe" the facts alleged as a ground for obtaining the attachment. The plea authorized by the statute, being therein designated as "in the nature" of a plea in abatement, was at one time held to be in fact such a plea, and to be governed by the same principles, subject to the same rules and liable to the same consequences as a plea in abatement;[1] and therefore not amendable after demurrer;[2] but afterwards this position was abandoned, and the plea held to be not strictly within the rules of pleading at common law applicable to pleas in abatement, and that it might be amended. Therefore, where the affidavit alleged that "the defendant has absented himself from his usual place of abode in the State of Missouri, so that the ordinary process of law cannot be served upon him," and the defendant filed a plea saying that "at the time stated in the affidavit, he had not absented himself from his usual place of abode in this State, so that the ordinary process of law could be served upon him;" and the plaintiff demurred to the plea; and the defendant asked leave to amend by inserting the word "not" after the word "could;" he was allowed to make the amendment.[3] If after filing such a plea, the defendant plead to the merits of the action, it is a waiver of the plea in abatement.[4] Where time has elapsed between the date of the affidavit and the issue of the writ, this plea puts in issue the truth of the facts alleged at the time the writ was obtained.[5] This mode of contesting the truth of the facts sworn to, being provided by the statute, their truth cannot be investigated on a motion.[6] And after the filing of a plea in abatement, it is not competent for the plaintiff to dissolve his attachment, and carry on his action as if it had been commenced by summons; for the statute gives the defendant the right to try the truth of the affidavit, and if the issue be found for him, to have the suit dismissed.[7] This plea does not put in issue the belief of the person making the affidavit, nor the goodness of the reasons for his belief, but the truth of the facts charged.[8] Nor can the intentions of the defendant be inquired into under it, except in those cases in which the statute contemplates such an investigation. Therefore, where the

[1] Livengood v. Shaw, 10 Missouri, 273; Hatry v. Shuman, 13 Ibid. 547.

[2] Livengood v. Shaw, 10 Missouri, 273.

[3] Cayce v. Ragsdale, 17 Missouri, 32.

[4] Hatry v. Shuman, 13 Missouri, 547; Cannon v. McManus, 17 Ibid. 345.

[5] Graham v. Bradbury, 7 Missouri, 281.

[6] Graham v. Bradbury, 7 Missouri, 281; Searcy v. Platte County, 10 Ibid. 269.

[7] Mense v. Osbern, 5 Missouri, 544.

[8] Chenault v. Chapron, 5 Missouri, 438; Dider v. Courtney, 7 Ibid. 500; Rheinhart v. Grant, 24 Missouri Appeal, 154. See Osborn v. Schiffer, 37 Texas, 434.

affidavit averred that the defendant had absconded or absented herself from her usual place of abode, so that the ordinary process of law could not be served upon her; and it was shown on the trial that her conduct had been of a character which might well induce the belief that she had absconded at the time the writ issued; it was held, that the court did right in refusing so to instruct the jury as to place before them the question as to the intentions of the defendant, and in instructing them that the only matter for their determination was, whether, at the time of the making of the affidavit, the defendant actually had absconded or absented herself, as charged.[1] Under this plea the defendant cannot take advantage of a misnomer. Elisha Swan and Nelson Deming were sued, and traversed the allegation that they were non-residents, and attempted to give in evidence that Deming's name was not "Nelson," but "Anson L.;" but it was held to be inadmissible.[2] Upon a trial of an issue under such a plea, evidence that the defendant was largely indebted to others besides the plaintiff was held immaterial.[3] Where three grounds of attachment were alleged, and the defendant pleaded in abatement to two of them only, it was held, that the omission to plead to the third ground was not an admission of its truth.[4]

§ 409 *a*. In whatever form the truth of the affidavit is allowed to be contested, it is quite certain that, on the hearing, the plaintiff cannot be allowed to give in evidence new facts which occurred *after* the affidavit was made, and are stated for the first time at the hearing, to prove an intent existing at the time the attachment was obtained.[5]

§ 410. Where two or more several grounds are stated in the affidavit for the attachment, and a plea in abatement is filed to the affidavit, it is not necessary that all the grounds should be proved, but the proving of either will be sufficient to sustain the attachment.[6] And where several different grounds of attachment are contained in the affidavit, it is not error for the court to instruct the jury, to make a separate finding as to each ground.[7]

[1] Temple *v.* Cochran, 13 Missouri, 116.
[2] Swan *v.* O'Fallon, 7 Missouri, 231.
[3] Switzer *v.* Carson, 9 Missouri, 740.
[4] Kritzer *v.* Smith, 21 Missouri, 296.
[5] Myers *v.* Whiteheart, 24 South Carolina, 196.
[6] Tucker *v.* Frederick, 28 Missouri, 574; Eisenhardt *v.* Cabanne, 16 Missouri Appeal, 531.
[7] Eisenhardt *v.* Cabanne, 16 Missouri Appeal, 531.

§ 410 *a*. A verdict in favor of the defendant on a plea in abatement releases the property attached, if no bill of exceptions is tendered at the term, though there had been no trial upon the issue of indebtedness. And the court had no power, at a subsequent term, to set aside the verdict and grant a new trial.[1]

§ 410 *b*. By taking issue upon the allegations of fact in an affidavit the defendant admits that if those allegations be found to be true, the affidavit is sufficient; and after a trial and a finding in favor of the allegations he cannot question the sufficiency of the affidavit.[2]

[1] Ranscher *v.* McElhinney, 11 Missouri Appeal, 434.

[2] Rice *v.* Morner, 64 Wisconsin, 599.

CHAPTER XVI.

DISSOLUTION OF AN ATTACHMENT.

§ 411. THE dissolution of an attachment discharges from its lien the property attached, whether levied on, or subjected in the hands of garnishees; and it has been held, that a legislative act which should undertake to restore an attachment already dissolved would be unconstitutional and void as against a purchaser of the property after the dissolution.[1] A dissolution may be produced by various causes, which will now be considered.

§ 412. The existence and operation of an attachment can continue no longer than the statute authorizing it. If, during the progress of a suit by attachment, the law be repealed, without authorizing the continued prosecution of pending suits, there can be no further proceeding, and the attachment is thereby dissolved.[2]

§ 413. Obviously, a final judgment for the defendant dissolves an attachment.[3]

§ 414. Defects in the plaintiff's proceedings may be equally fatal, unless remediable by amendment. They are usually found in the affidavit or the bond; and the ordinary way to take advantage of them is by a motion to dissolve, set aside, or quash the attachment.[4] Every attempt to overturn an attachment in this way must precede plea to the merits; for by such plea the defendant is considered to waive all exceptions to such defects;[5]

[1] Ridlon *v.* Cressey, 65 Maine, 128.

[2] Stephenson *v.* Doe, 8 Blackford, 508.

[3] *Ante*, § 228; Clapp *v.* Bell, 4 Mass. 99; Johnson *v.* Edson, 2 Aikens, 299; Suydam *v.* Huggeford, 23 Pick. 465; Brown *v.* Harris, 2 G. Greene, 505; Harrow *v.* Lyon, 3 Ibid. 157.

[4] Jordan *v.* Hazard, 10 Alabama, 221; Brown *v.* Coats, 56 Ibid. 439.

[5] Garmon *v.* Barringer, 2 Devereux & Battle, 502; Stoney *v.* McNeill, Harper, 156; Young *v.* Grey, Ibid. 38; Watson *v.* McAllister, 7 Martin, 368; Enders *v.* Steamer Henry Clay, 8 Robinson (La.), 30; Symons *v.* Northern, 4 Jones, 241; Judah *v.* Duncan, 2 Bailey, 454; Gill *v.* Downs, 26 Alabama, 670; Drakford *v.* Turk, 75 Ibid. 339; Smith *v.* Cromer, 66 Mississippi, 161; Memphis R. R. Co. *v.* Wilcox, 48 Penn. State, 161.

and the court can make no order quashing the attachment, which can interfere with the trial of the issues made by the pleadings.[1] When the defendant appears and moves to dissolve the attachment, it is held, in Missouri, to be such an appearance to the action as will authorize a judgment by default against him, if he fails to plead to the merits, whether he was served with process or not;[2] but not so in Louisiana or Illinois, if he was not so served.[3] In the last-named State, an appearance by a defendant not served with process, to move to set aside a judgment by default against him, is held not to be a general appearance, authorizing a personal judgment against him;[4] and in New Mexico, that a motion by a defendant to quash an attachment for irregularity is not a general appearance.[5]

§ 414 *a*. The right of the defendant to move the dissolution of an attachment on account of defects in obtaining it, may be lost by any act of his amounting to a waiver of exceptions, besides that of pleading to the merits. Thus, where both the plaintiff and the defendant, and also third parties claiming the attached property, agreed that the property should be summarily sold by the sheriff and the proceeds retained by him until final judgment, the defendant was held to have acquiesced in the process against him, and abandoned all right to contest its propriety.[6]

§ 415. Every motion to dissolve, set aside, or quash an attachment is based on defects apparent on the face of the proceedings, and nothing will be considered on the hearing of such a motion, but what is thus apparent.[7] The motion must specify the grounds upon which it is made. It is not sufficient to say that it is made "because the writ was improperly issued;" there must be a statement of the points of objection upon which the moving party will rely.[8] If there is any intrinsic defect in the proceedings, not discernible on their face, it cannot be brought before the court on a motion of this description, but must be reached in some other mode. For example, an attachment bond

[1] Carr *v.* Coopwood, 24 Mississippi, 256.

[2] Whiting *v.* Budd, 5 Missouri, 443; Evans *v.* King, 7 Ibid. 411.

[3] Bonner *v.* Brown, 10 Louisiana, 334; Johnson *v.* Buell, 26 Illinois, 66.

[4] Klemm *v.* Dewes, 28 Illinois, 317; Jones *v.* Byrd, 74 Ibid. 115.

[5] Holzman *v.* Martinez, 2 New Mexico, 271.

[6] Wickman *v.* Nalty, 41 Louisiana Annual, 284.

[7] Baldwin *v.* Conger, 9 Smedes & Marshall, 516; Hill *v.* Bond, 22 Howard Pract. 272; Cooper *v.* Reeves, 13 Indiana, 53; Wright *v.* Smith, 19 Texas, 297; Hill *v.* Cunningham, 25 Ibid. 25.

[8] Freeborn *v.* Glazer, 10 California, 337.

is executed in the name of the plaintiff, by an attorney in fact. The attorney may have had sufficient authority, or he may not; but whether or not, the court will not inquire into that fact on a motion to dissolve. The scrutiny will not extend beyond the record; and if there is a bond there, though it may in fact have been executed without any valid authority, it is sufficient, *pro hac vice*, to sustain the attachment.[1] So where an attachment is taken out by a corporation, the court will not, on such a motion, allow the defendant to show that the corporation had no power under its charter to execute the bond.[2]

In Pennsylvania, however, on a rule to show cause why an attachment should not be set aside, the defendant was allowed to show that the plaintiff had obtained judgment in another State on the same demand, and levied execution there; and the attachment was quashed.[3] But it was not regarded as any objection to an attachment, that the plaintiff had sued out an attachment in another State for the same cause of action, unless, perhaps, the defendant had there given bail.[4] But the pendency of another suit by attachment in the same State, for the same cause of action, was, in Mississippi, held to be good in abatement.[5]

§ 416. A misrecital, in the writ, of the court to which it is returnable, is no ground for dissolving an attachment, where the nature and character of the writ show that it could be returnable only in a particular court;[6] much less, where the writ is actually returned into the proper court.[7] And where the practice was to recite in the writ the grounds of attachment set forth in the affidavit; and an affidavit alleged that the defendant "so absconds or conceals himself that the ordinary process of law cannot be served on him;" and the writ recited that oath had been made that the defendant "hath removed, or is about to remove himself out of the county, or so absconds or conceals himself that the ordinary process of law cannot be served upon him;" it was held,

[1] Lindner *v.* Aaron, 5 Howard (Mi.), 581; Spear *v.* King, 6 Smedes & Marshall, 276; Jackson *v.* Stanley, 2 Alabama, 326; Lowry *v.* Stowe, 7 Porter, 483; Calhoun *v.* Cozzens, 3 Alabama, 21; Goddard *v.* Cunningham, 6 Iowa, 400; City Nat. Bank *v.* Cupp, 59 Texas, 268.

[2] Bank of Augusta *v.* Conrey, 28 Mississippi, 667.

[3] Downing *v.* Phillips, 4 Yeates, 274.

[4] Fisher *v.* Consequa, 2 Washington, C. C. 382; Clark *v.* Wilson, 3 Ibid. 560.

[5] James *v.* Dowell, 7 Smedes & Marshall, 333.

[6] Byrd *v.* Hopkins, 8 Smedes & Marshall, 441; Wharton *v.* Conger, 9 Ibid. 510.

[7] Blake *v.* Camp, 45 Georgia, 298.

that the writ did not follow the terms of the affidavit, and left it uncertain as to the ground of the proceeding, and it was quashed.[1] A contrary doctrine, however, was maintained in Mississippi, where it was held, that such a misrecital would not vitiate the attachment, if the record showed that the proper averment was made in the affidavit.[2]

§ 417. The issue of an attachment on Sunday is at common law an irregularity, which, if appearing on the face of the writ, will justify the quashing of it. But if it do not so appear, the court, *where the act of the clerk is judicial, and not merely ministerial*, cannot order the clerk to alter the date of the writ, so as to make it show that it was issued on Sunday, and then quash it.[3]

§ 418. It is not admissible for the defendant, in order to dissolve an attachment on motion, to show that the debt was not due;[4] or that the amount claimed by the plaintiff is unconscionable or unreasonable;[5] nor upon such a motion can the nature, validity, or justice of the cause of action sued on be inquired into.[6] This would be to try in a summary and collateral way the main issue in the cause. Nor can he move to discharge the attachment on the ground that the property attached did not belong to him;[7] nor because one of several counts in the declaration sets up an illegal and void cause of action while the other counts are legal;[8] nor because the cause of action is improperly or defectively stated in the complaint.[9] Nor is it admissible for the court, upon the trial, to dissolve the attachment because the plaintiff is found to be not entitled to recover an amount equal to that sworn to in the affidavit on which the attachment issued.[10] But if, under a system of pleading where a complaint takes the place of a declaration, the complaint does not state a cause of action, and is incurable by amendment, the attachment may be dissolved on motion. If, however, the complaint can be made

[1] Woodley *v.* Shirley, Minor, 14.

[2] Lovelady *v.* Harkins, 6 Smedes & Marshall, 412; Clanton *v.* Laird, 12 Ibid. 568; McClanahan *v.* Brack, 46 Mississippi, 246.

[3] Matthews *v.* Ansley, 31 Alabama, 20.

[4] Fisher *v.* Taylor, 2 Martin, 79, 113; Smith *v.* Elliott, 3 Ibid. 366; Reiss *v.* Brady, 2 California, 132.

[5] Lord *v.* Gaddis, 6 Iowa, 57.

[6] Alexander *v.* Brown, 2 Disney, 395; Miller *v.* Chandler, 29 Louisiana Annual, 88.

[7] Langdon *v.* Conklin, 10 Ohio State, 439; Mitchell *v.* Skinner, 17 Kansas, 563.

[8] Wilson *v.* Danforth, 47 Georgia, 676.

[9] Cope *v.* U. M. M. & P. Co., 1 Montana, 53.

[10] Brown *v.* Ainsworth, 32 Georgia, 487.

good by amendment, the plaintiff should be allowed to amend before the decision of the motion to dissolve.[1]

§ 418 *a*. In Alabama, the practice is to allow an *amicus curiæ* to move to quash an attachment for irregularities;[2] but I have not noticed the existence of such a practice in any other State.

§ 419. The question whether one not a party to the record, but who has an interest in the attached property, can make a motion to quash the attachment, arose in Alabama, where it was held, that a mortgagee, whose lien was acquired after the levy of the attachment, could not make such motion for defects apparent in the record;[3] and much less for matters *dehors* the record.[4] But in Texas it was decided that the sureties in a delivery bond sustain such a relation to the action as to authorize them to move to quash the attachment.[5]

§ 420. The entertainment of a motion to quash or dissolve an attachment for irregularities in the proceedings is within the discretion of the court, and a refusal by the court to entertain it will not be controlled by mandamus,[6] or revised on error.[7] Nor will the decision of the court overruling such a motion be so revised.[8] But where the judgment of a court quashing an attachment has been had in this summary mode, its correctness may be examined on error;[9] but not unless the reasons for its action are spread upon the record, or preserved in a bill of exceptions.[10] Where, however, the objection to the attachment is not on the ground of irregularity, but because it was sued out upon the cause of action not contemplated by the statute, the court in which the action is pending should dismiss the suit;[11] and if it

[1] Hathaway *v.* Davis, 33 California, 161.

[2] Planters' and Merchants' Bank *v.* Andrews, 8 Porter, 404.

[3] May *v.* Courtnay, 47 Alabama, 125.

[4] Cockrell *v.* McGraw, 33 Alabama, 526. See Metts *v.* P. & A. L. Ins. Co., 17 South Carolina, 120; Copeland *v.* P. & A. L. Ins. Co., Ibid. 116.

[5] Burch *v.* Watts, 37 Texas, 135.

[6] *Ex parte* Putnam, 20 Alabama, 592.

[7] Reynolds *v.* Bell, 3 Alabama, 57; Massey *v.* Walker, 8 Ibid. 167; Ellison *v.* Mounts, 12 Ibid. 472; Hudson *v.* Daily, 13 Ibid. 722; Gee *v.* Alabama, L. I. & T. Co., Ibid. 579; Gill *v.* Downs, 26 Ibid. 670; Watson *v.* Auerbach, 57 Ibid. 353; Busbin *v.* Ware, 69 Ibid. 279; Rich *v.* Thornton, Ibid. 473.

[8] Massey *v.* Walker, 8 Alabama, 167; Ellison *v.* Mounts, 12 Ibid. 472; Gill *v.* Downs, 22 Ibid. 670; Miller *v.* Spreeher, 2 Yetes, 162; Brown *v.* Ridgway, 10 Penn. State, 42; Lindsley *v.* Malone, 23 Ibid. 24; Baldwin *v.* Wright, 3 Gill, 241; Mitchell *v.* Chesnut, 31 Maryland, 521; First Nat. Bank *v.* Weckler, 51 Ibid. 30.

[9] Reynolds *v.* Bell, 3 Alabama, 57.

[10] Cobb *v.* O'Neal, 1 Howard (Mi.), 581; Freeborn *v.* Glazer, 10 California, 337.

[11] Elliott *v.* Jackson, 3 Wisconsin, 649.

do not, the appellate court will review its action, and itself exercise the remedy.[1]

§ 421. The refusal of the court in which the attachment was brought, to dissolve it on motion, does not preclude its doing so at the final hearing.[2]

§ 422. In this connection may be considered the effect of the death of the defendant upon an attachment. The decisions on this subject are few, and mostly so connected with local statutes as to have little general applicability. Of this description are the reported cases in Maine and Massachusetts.

In Rhode Island it is held, on common-law principles, that the attachment is dissolved by the death of the defendant; notwithstanding the statute of that State declaring that "the executor or administrator of such deceased party, in case the cause of action survives, shall have full power to prosecute or defend such action or suit from court to court until final judgment; and is hereby obliged to prosecute or defend the same accordingly."[3]

In Pennsylvania, where a foreign attachment, as under the custom of London, is a process to compel the appearance of a non-resident debtor, by distress and sale of the property attached, it is held, that the death of the defendant before final judgment dissolves the attachment, if he shall not have entered special bail. But his death after final judgment does not have that effect. In the case in which these points were decided, the court say: "If these proceedings were in all respects *in rem*, they would not abate by the death of the defendant. For some purposes they are to be so considered; for execution can only be against the goods attached, but not against the person of the defendant; but to every purpose they are not; for by entering special bail, the attachment is dissolved, and it then becomes a mere personal action."[4] The United States Circuit Court for the District of Columbia held the same position.[5]

In Louisiana, an attaching creditor acquires no privilege upon the property of a debtor in that State, who dies during the pendency of the suit, and whose estate is administered upon there,

[1] Griswold *v.* Sharpe, 2 California, 17.

[2] Talbot *v.* Pierce, 14 B. Monroe, 195.

[3] Vaughn *v.* Sturtevant, 7 Rhode Island, 372; Upham *v.* Dodge, 11 Ibid. 621.

[4] Fitch *v.* Ross, 4 Sergeant & Rawle, 557; Bieber *v.* Weiser, 1 Woodward's Decisions, 473.

[5] Pancost *v.* Washington, 5 Cranch, C. C. 507.

so as to entitle the creditor to priority of payment out of the assets of the estate.[1]

In Tennessee, if the defendant die *pendente lite*, no judgment can be rendered without making his administrator a party; and after judgment against the administrator, no order for the sale of real estate attached can be made, without making the heirs parties to the proceeding;[2] but where these steps were taken, the court ordered a sale of the land; which was, in effect, to hold that the attachment was not dissolved by the death of the defendant.[3]

In Missouri,[4] California,[5] and Alabama,[6] the death of the defendant before judgment dissolves the attachment; and in the former State, if the death take place after the rendition of a judgment without personal service, and therefore binding only the property attached, the same result will follow.[7]

In South Carolina, a foreign attachment abates by the death of the defendant pending the suit; but when the garnishee has made default, judgment may be had against him after the defendant's death.[8]

In New York, it was held, that the plaintiff acquired by the attachment a right in the property attached, which could not be defeated by the death of the defendant, if the action survived, and the court had power to continue it against the representative.[9] And so in West Virginia,[10] and Iowa.[11]

In Mississippi, the statute provides that "if the defendant shall die, after the service of the writ of attachment, the action shall not thereby be abated or discontinued, but shall be carried on to judgment, sale, transfer, and final determination, as if the defendant were still alive, and such death had not occurred." And it was there held, that the death of the defendant puts an end to the power of the court to render a personal judgment against him; but that a judgment may be rendered against him as a necessary means to charge a garnishee; that it can reach only what was attached in the garnishee's hands; and

[1] Collins *v.* Duffy, 7 Louisiana Annual, 39.

[2] Green *v.* Shaver, 3 Humphreys, 139.

[3] Perkins *v.* Norvell, 6 Humphreys, 151.

[4] Sweringen *v.* Eberius, 7 Missouri, 421. See Loubat *v.* Kipp, 9 Florida, 60.

[5] Myers *v.* Mott, 29 California, 359; Hensley *v.* Morgan, 47 Ibid. 622.

[6] Phillips *v.* Ash, 68 Alabama, 414; Lipscomb *v.* McClellan, 72 Ibid. 151.

[7] Harrison *v.* Renfro, 13 Missouri, 446.

[8] Kennedy *v.* Raguet, 1 Bay, 484; Crocker *v.* Radcliffe, 1 Constitutional Court (Treadway), 83.

[9] Moore *v.* Thayer, 10 Barbour, 258; 6 Howard Pract. 47; 3 Code Reporter, 176; Thacher *v.* Bancroft, 15 Abbott Pract. 243.

[10] White *v.* Heavner, 7 West Virginia, 324.

[11] Lord *v.* Allen, 34 Iowa, 281.

when that is accomplished, the judgment has no further virtue.[1] And where no service of summons on the defendant was had before his death, and his administrator, nevertheless, appeared to the action and pleaded to the merits; and trial being had on the pleas, and verdict and judgment rendered for the plaintiff, judgment was also given against garnishees who had been summoned before the defendant's death.[2]

§ 423. Whatever diversity of views may exist, as to the effect upon a pending attachment of the death of the defendant, there can be no doubt that a suit by attachment, commenced after the death of the defendant, is utterly void, and therefore that no attachment of property, or proceeding by garnishment, in such suit, can have any validity whatever.[3]

§ 424. The same views which would abate or dissolve an attachment upon the death of a person, would produce a like result in the case of the civil death of a corporation.[4]

§ 425. In this connection, too, may be considered the effect upon an attachment of an act of bankruptcy committed by the defendant after the levy of the writ. Does that act dissolve an attachment previously made? This question has excited elaborate discussion by some of the first jurists of the country. It will at once be seen to turn altogether on the point whether an attachment is *a lien*, in such sense as to be within that clause of the Bankrupt Law which protects existing liens against the operation of the law. If a lien, the attachment cannot be dissolved by an act of bankruptcy on the part of the defendant.

The late Justice STORY, on more than one occasion, during the existence of the General Bankrupt Act of 1841, decided that an attachment under *mesne* process was not a lien, either in the sense of the common law, or of the maritime law, or of equity; but only a contingent and conditional charge, until the judgment and levy; and therefore was dissolved by the defendant's bankruptcy.[5] In this judgment, that learned jurist stood opposed by

[1] Holman *v.* Fisher, 49 Mississippi, 472.

[2] Dyson *v.* Baker, 54 Mississippi, 24.

[3] Loring *v.* Folger, 7 Gray, 505.

[4] Bowker *v.* Hill, 60 Maine, 172; Farmers and Mechanics' Bank *v.* Little, 8 Watts & Sergeant, 207; Paschall *v.* Whitsett, 11 Alabama, 472. In Lindell *v.* Benton, 6 Missouri, 361, it was held, that the civil death of a corporation, after the garnishment of its debtor, did not prevent the subjection of the garnishee to liability.

[5] Foster's Case, 2 Story, 131; Bellows and Peck's Case, 3 Story, 428.

every other tribunal in the United States before which the question was made, except the Supreme Court of Louisiana.[1] The great weight attached to his views on any question led, after the promulgation of those decisions, to several very able opinions in favor of the opposite conclusion. Indeed, in every instance where the subject was passed upon, with the single exception just named, the lien of the attachment was sustained. The District Court of the United States for Vermont,[2] the late Justice Thompson, of the Supreme Court of the United States,[3] and the Supreme Courts of Maine,[4] New Hampshire,[5] Massachusetts,[6] New Jersey,[7] Mississippi,[8] and Illinois[9] all concurred in that result. The Supreme Court of Connecticut, in a case arising under the Bankrupt Act of 1800, also held views opposed to those of Justice STORY.[10] When to these adverse opinions we add the numerous decisions of different courts previously cited,[11] affirming the lien of an attachment, we are justified in considering it settled by the weight of authority, that an attachment is not dissolved by the defendant's bankruptcy.[12]

§ 426. When an attachment has been dissolved, by reason of a judgment in favor of the defendant, or otherwise, the special property of the officer in the attached effects is at an end, and he is bound to restore them to the defendant, if he is still the owner of them, or if not, to the owner; and this without being reimbursed any money he may have paid, in extinguishment of a lien, in order to obtain the property under the writ, or as expenses connected with its safe keeping.[13] If he fail to make such return, he is liable for the property. His informing the defendant that he has relinquished the attachment, while he keeps the property locked up in the house in which it was at-

[1] Fisher *v.* Vose, 8 Robinson (La.), 457.

[2] Downer *v.* Brackett, 5 Law Reporter, 392; 21 Vermont, 599; Rowell's Case, 6 Law Reporter, 300; 21 Vermont, 620.

[3] Haughton *v.* Eustis, 5 Law Reporter, 505.

[4] Franklin Bank *v.* Batchelder, 23 Maine, 60.

[5] Kittredge *v.* Warren, 14 New Hamp. 509; Kittredge *v.* Emerson, 15 Ibid. 227; Buffum *v.* Seaver, 16 Ibid. 160. See Peck *v.* Jenness, 7 Howard Sup. Ct. 612.

[6] Davenport *v.* Tilton, 10 Metcalf, 320.

[7] Vreeland *v.* Brown, 1 Zabriskie, 214.

[8] Wells *v.* Brander, 10 Smedes & Marshall, 348.

[9] Hill *v.* Harding, 93 Illinois, 77.

[10] Ingraham *v.* Phillips, 1 Day, 117.

[11] *Ante*, § 224.

[12] This section does not refer to the General Bankrupt Act of March 2, 1867; under which the assignment of the bankrupt's effects operates as a dissolution of any attachment of his property made within four months next preceding the commencement of the proceedings in bankruptcy.

[13] Felker *v.* Emerson, 17 Vermont, 101; McReady *v.* Rogers, 1 Nebraska, 124.

tached, is no return of the property.[1] And he cannot screen himself from this liability, by delivering the property to the plaintiff. It is not his duty — indeed it would be contrary to his duty — to make such a delivery to the creditor, even after his demand is ascertained and sanctioned by a judgment. Goods attached are in the legal custody of the officer, and he is accountable for them, no less to the defendant than to the plaintiff in the attachment; and the general property in the goods is not changed, until a levy and sale under execution.[2] But in order to entitle the defendant to a return of the property, the attachment must, in fact, have been dissolved. It is not enough that the defendant has settled with the plaintiff the matter in controversy, and is entitled, as against the plaintiff, to a return of the property. The fact of such settlement must be brought home to the officer, by actual notice, or by a discontinuance of the suit, before the defendant can maintain an action against him for the property.[3]

The same obligation to return the attached property to the owner rests upon the officer, where the plaintiff has instructed him to release the levy of the writ;[4] and likewise where the attachment is discharged by a payment of the debt; but in the latter case the officer cannot be charged as a wrong-doer for holding the property until satisfactory evidence be given him that the attachment has been vacated.[5] *Prima facie*, in such cases, the officer must assume the defendant to be the owner; but if he have notice of a sale of the property by the defendant, he must not deliver it to the defendant, but to the vendee.[6] And whenever the obligation rests upon the officer to return the property, either to the defendant or to a vendee, the sureties in the officer's official bond are liable for his failure to make such return.[7]

§ 427. The liability of the officer to the defendant, for the attached property, does not necessarily accrue in all cases immediately upon the dissolution of the attachment; but must depend, as to the time when it accrues, upon the particular circumstances of the case. Thus, where property was delivered by the officer to a receiptor, approved by the defendant, and the receiptor failed to deliver it when required, it was decided, that the defendant could not maintain an action against the officer there-

[1] Becker v. Bailies, 44 Conn. 167.
[2] Blake v. Shaw, 7 Mass. 505. See Snead v. Wegman, 27 Missouri, 176.
[3] Livingston v. Smith, 5 Peters, 90.
[4] Levy v. McDowell, 45 Texas, 220.
[5] Wheeler v. Nichols, 32 Maine, 233.
[6] State v. Fitzpatrick, 64 Missouri, 185.
[7] Levy v. McDowell, 45 Texas, 220; State v. Fitzpatrick, 64 Missouri, 185.

for, until the lapse of a reasonable time to enable the latter to recover it from the receiptor.[1]

§ 428. The right of the defendant to demand a return of attached property upon the dissolution of an attachment, is suspended by an appeal or writ of error, with notice thereof to the officer. But if before writ of error or appeal the defendant demands it, and the officer gives it up, the latter cannot afterwards, on reversal of the judgment, be held responsible for it.[2] This was ruled in a case where the judgment dissolving the attachment was rendered "at the spring term" of the court, and the writ of error was not sued out until the following November, and in the intervening June the sheriff returned the proceeds of the attached property to the defendant.

But where the attachment plaintiff acts promptly in taking the case to a higher court, by appeal or writ of error, operating as a *supersedeas*, it were a great injustice to him to hold that the officer who attached the property may give it back to the defendant, and escape all liability for it to the plaintiff, when the judgment dissolving the attachment is reversed, and the plaintiff's right to hold the property has been established. In such case, there would hardly seem room for doubt that the contrary view taken by the Supreme Court of Iowa is correct. There the attachment plaintiff, at the same term of the court at which his attachment was dissolved, and within four days after the dissolution, appealed from the judgment, and gave a *supersedeas* bond; but in the interval the officer, *without any order of the court*, gave back the attached property to the defendant. On the appeal the judgment dissolving the attachment was reversed; and the Supreme Court held, that the plaintiff had not lost his right to recourse upon the attached effects.[3] But in another branch of the same case, that court subsequently held that this decision had no reference to a case where the rights of third persons were involved. And so, where a sum of money was in the hands of the clerk of the court, as proceeds of the sale of part of the attached property, and between the time when the attachment was dissolved and that of taking the appeal, the clerk, without knowing that the appeal would be taken, paid over the money to the defendant; it was held, that he could not be made liable, if he paid it in good faith; that if the plaintiff wished the money to remain *in statu quo* he should have notified the clerk

[1] Bissell *v.* Huntington, 2 New Hamp. 142.

[2] Sherrod *v.* Davis, 17 Alabama, 312.

[3] Danforth *v.* Carter, 4 Iowa, 230.

of his intention to appeal; and that if the clerk had paid it over after such notice he would have been liable.[1] But in every such case it is undoubtedly the safest course for the officer to require an order of the court for the payment of the money to the defendant.

In Arkansas, a plaintiff appealed from a judgment in favor of the defendant, on demurrer, but failed to file in due time in the appellate court a transcript of the record, and the appeal was for that reason dismissed. One month and four days after the dismissal of the appeal, the plaintiff sued out a writ of error. No *supersedeas* bond was given, either on the appeal or the writ of error. Under that writ the appellate court reversed the judgment of the inferior court, and ordered the latter to sustain the demurrer, which was done. The case was then tried on the merits, and the issues were found for the plaintiff; whereupon the court rendered a judgment *in personam* against the defendant, and then proceeded to order, that, as no bond was given on the appeal or on the writ of error, the attachment lien was lost by the judgment in favor of the defendant, which had been reversed. The Supreme Court held, that the lien of the attachment was not lost, and annulled and set aside this order.[2]

§ 428 *a*. Upon the dissolution of an attachment, if the plaintiff intends to appeal from the order of dissolution, he should do so immediately, or obtain an order of the court staying the dissolution for a time sufficient to enable him to perfect an appeal in such form as to operate as a *supersedeas*. In the absence of such an order the officer is not bound to retain the property to enable the plaintiff to appeal, but may without delay return it to the defendant.[3]

§ 429. Where two attachments were executed on the same effects, and the one first executed was quashed, and the judgment quashing it was reversed; but in the mean time the property was sold and the proceeds paid to the plaintiff in the second attachment; it was decided that the first attaching creditor was entitled to recover from the second the money paid over to him.[4] But where over three years elapsed before the writ of error was prosecuted, it was held, that the attachment was not revived as against third persons.[5] And if the first attacher dismiss his

[1] Danforth *v.* Rupert, 11 Iowa, 547.
[2] Harrison *v.* Trader, 29 Arkansas, 85.
[3] Ryan Drug Co. *v.* Peacock, 40 Minnesota, 470.
[4] Caperton *v.* McCorkle, 5 Grattan, 177.
[5] Harrow *v.* Lyon, 3 G. Greene, 157.

suit, but afterwards, with the consent of the defendant, obtain leave of court to reinstate it on the docket, such reinstatement cannot have the effect of restoring his priority, as against a subsequent attacher.[1]

§ 430. Where property is attached and sold, and the proceeds paid to the plaintiff, a reversal of the judgment by an appellate court, on grounds not affecting the merits of the plaintiff's claim, will not entitle the defendant to recover the proceeds back from the plaintiff, where it appears that he prosecuted his suit in good faith, believing himself legally entitled to do it. If prosecuted, however, for the purpose of obtaining an undue advantage, by getting hold of the proceeds of the sale of the property, he would not be permitted to avail himself of an advantage thus improperly obtained.[2]

§ 431. Where, as in several States, the sale of attached property on *mesne* process is authorized, if an officer make such sale of part of the attached effects, and realize therefrom a sufficiency to pay the debt on which the attachment was obtained, it is held, in Vermont, that that will not dissolve the attachment as to the remainder, or impair the creditor's lien on it, whatever may be the officer's liability for attaching more property than was needed to satisfy the debt.[3]

[1] Murphy *v.* Crew, 38 Georgia, 139.
[2] Jackson *v.* Holloway, 14 B. Monroe, 133.
[3] Marshall *v.* Town, 28 Vermont, 14.

NOTE. — *A large part of this Chapter, as arranged in some previous editions, has been transferred to Chapter XII.; which accounts for the hiatus in the section numbers at this point.*

In Chapters XI. and XII., the matter of dissolution of attachment by other means than those set forth in this Chapter is discussed.

CHAPTER XVII.

NOTICE TO ABSENT DEFENDANTS BY PUBLICATION.

§ 436. THE mere issue of a writ of attachment, and levying it on the property of the defendant, without service of process on him, without notice to him in any way, and without appearance on his part, is not a sufficient foundation for a judgment in the attachment suit against him.[1] And as in many cases the absence of the defendant would preclude the possibility of service of process on him, provision is usually made in attachment laws for notice by publication to absent defendants, of the institution and pendency of attachment suits against them, in order that they may, if they see proper, appear and defend.

§ 436 *a*. If the statute do not prescribe a time within which service by publication must begin to be made, delay therein is not a ground for dismissing the action for want of jurisdiction; but might justify a dismissal for failure to prosecute. This was so held where the suit was brought in August, 1879, and the publication did not begin till March, 1880.[2]

§ 437. This notice is not necessary to give the court jurisdiction of the action. Its object is simply to inform the defendant, if possible, that proceedings have been taken against him. Whether a court has jurisdiction of any particular proceeding is determined by establishing its authority to take the first step therein. When, therefore, in an attachment cause, the ground required by statute has been laid for the issue and execution of the process, and the process has been issued and executed, the jurisdiction of the court has attached. If this ground be not laid, there is no right to take the first step, and that and all subsequent ones are simply void. When, however, jurisdiction

[1] Edwards *v.* Toomer, 14 Smedes & Marshall, 75; Ridley *v.* Ridley, 24 Mississippi, 648; Martin *v.* Dryden, 6 Illinois (1 Gilman), 187.

[2] Bacher *v.* Shawhan, 41 Ohio State, 271.

has been attained, the subsequent proceedings must conform to the law, in order to make the action of the court effectual. Want of such conformity will be error, and, therefore, a good ground for reversing the judgment of the court; but will not make the proceedings void. When, therefore, notice to the defendant by publication is required, it is not an element of the jurisdiction of the court, but is necessary to authorize the court to exercise its jurisdiction by giving judgment in the cause;[1] and when the defendant is thus notified, he is before the court for all purposes except the rendition of a personal judgment against him;[2] and the judgment obtained against him is so far conclusive, that the rights of purchasers of property under it will be protected.[3]

In Michigan, the broad doctrine is laid down, that all exceptional methods of obtaining jurisdiction over persons not found must be confined to the cases and exercised in the way precisely indicated by the statute; and that a failure to comply with the statutory requirements where the jurisdiction conferred is special, and no personal service is obtained, renders the judgment null and void.[4]

§ 437 *a*. The fact of publication according to statutory requirement must appear in the record, or the judgment may be reversed.[5] It may appear either by the court's entering of record a finding of the fact, or by setting out in the record the evidence of publication;[6] the former mode being much preferable. And where the record shows the fact of publication to have been duly made, the filing of an affidavit in the appellate court, stating that in the first insertion of the notice in the newspaper there was a typographical error in the defendant's name, will not be sufficient to overcome the proof in the record.[7] Where the statute does not require the proof of publication to be made in any particular mode, the court will receive such evidence as may be satisfactory to it; and then it is important that it should enter of record that the publication has been proved. If proof

[1] Paine *v.* Mooreland, 15 Ohio, 435; Williams *v.* Stewart, 3 Wisconsin, 773; Beech *v.* Abbott, 6 Vermont, 586; Massey *v.* Scott, 49 Missouri, 278; Feild *v.* Dortch, 34 Arkansas, 399; Newman *v.* Manning, 89 Indiana, 422. *Sed contra*, Calhoun *v.* Ware, 34 Mississippi, 146.

[2] King *v.* Vance, 46 Indiana, 246.

[3] Bliss *v.* Heasty, 61 Illinois, 338.

[4] Steere *v.* Vanderberg, 67 Michigan, 530; King *v.* Harrington, 14 Ibid. 532; Millar *v.* Babcock, 29 Ibid. 526; Woolkins *v.* Haid, 49 Ibid. 299; Nugent *v.* Nugent, 70 Ibid. 52.

[5] Foyles *v.* Kelso, 1 Blackford, 215; Haywood *v.* McCrory, 33 Illinois, 459; Haywood *v.* Collins, 60 Ibid. 328; Thormeyer *v.* Sisson, 88 Ibid. 188; Newman *v.* Manning, 89 Indiana, 422; Spillman *v.* Williams, 91 N. Carolina, 483.

[6] Haywood *v.* Collins, 60 Illinois, 328.

[7] Lawyer *v.* Langhans, 85 Illinois, 138.

in a particular mode be required by statute, the fact of its having been made in that mode may either appear by inserting the evidence in the record or by a record finding that the publication has been made. If the statute does not require a particular mode of proof, but authorizes the fact of publication to be established by the certificate of a printer or publisher; and it is sought to prove it in that way, and to show by the insertion of the certificate in the record that the publication has been made, it will be insufficient if the certificate do not follow the statutory authority. Thus where the law authorizes publication to be shown by the certificate of the printer or publisher, with a written or printed copy of the notice annexed, a certificate inserted in the record, which does not show that the party making it was printer or publisher, will not suffice.[1] And where the law requires the certificate to state the dates of the first and last papers containing the advertisement, the omission to state the date of the last paper vitiates the proof.[2] And where the court makes a record finding of the fact of publication, it is not enough to find "that publication was made, giving the defendant notice according to law;" but the record must show that the publication was made the number of times required by the statute.[3] When the court makes such a finding, showing the due publication of the notice, in the manner and for the number of times required by law, the correctness of the finding cannot be collaterally questioned.[4]

§ 438. This subject presents itself in a twofold aspect: 1. As to the sufficiency of the notice, as the foundation for further proceedings in the cause; and, 2. As to the effect of failing to publish notice, or of publishing an insufficient one, upon the validity of the subsequent proceedings in the suit, when afterwards called in question *inter alios.*

§ 439. Under the first head, the sufficiency of the notice to authorize judgment against the defendant depends on its conformity to the statute in its terms and its publication. As to the terms, there should be a substantial, if not a strict compliance with the law. Therefore, where the advertisement was required to "state the names of the parties, the day, month, and

[1] Haywood *v.* McCrory, 33 Illinois, 459; Haywood *v.* Collins, 60 Ibid. 328.

[2] Haywood *v.* McCrory, 33 Illinois, 459.

[3] Dow *v.* Whitman, 36 Alabama, 604; Diston *v.* Hood, 83 Ibid. 331.

[4] Freeman *v.* Thompson, 53 Missouri, 183.

year, when, and from what court, and for what sum, the writ issued," and it omitted to state the day, month, and year when the writ issued, it was held to be insufficient.[1]

§ 440. In Missouri, where the statute required "the court to order a publication to be made, stating the nature and amount of the plaintiff's demand," etc., it was held that stating in the notice "that an action of assumpsit for the sum of $403.70 had been commenced against him," was a sufficient statement of the nature of the plaintiff's demand.[2] Under the same statute, it was decided that a notice stating that the proceedings were "founded on two promissory notes for the sum of $386.94," was uncertain upon the material point of the amount actually *claimed;* and the judgment was for that cause set aside.[3]

In the same State, it was ruled, under a statute requiring the defendant to be notified "that his property had been attached," that a notice omitting that clause was bad;[4] but afterwards a judgment rendered on such a notice was sustained.[5] Under the same statute, a notice stating that "his property was about to be attached," was considered sufficient.[6]

In Nebraska, under a statute declaring that the publication "must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the persons thus to be served, when they are required to answer," it was at one time held, that a notice which did not so describe real estate that had been attached as to identify it, was wholly defective;[7] but afterwards the court receded from this position, and decided that it was sufficient for the notice to say that the defendant's "property had been attached;"[8] and still later a notice was pronounced a sufficient compliance with the statute, which wholly omitted any statement that the defendant's property had been attached, and merely said that the plaintiff "has commenced a suit in attachment."[9]

§ 441. In Michigan, the statute requires the clerk, upon the return of the writ, to make out an advertisement, stating the names of the parties, the time when, from what court, and for what sum, the writ was issued. A notice containing all the

[1] Ford *v.* Wilson, Tappan, 235.
[2] Sloan *v.* Forse, 11 Missouri, 126. See Freeman *v.* Thompson, 53 Ibid. 183.
[3] Haywood *v.* Russell, 44 Missouri, 252.
[4] Durrossett's Adm'r *v.* Hale, 38 Missouri, 346.
[5] Moore *v.* Stanley, 51 Missouri, 317.
[6] Harris *v.* Grodner, 42 Missouri, 159.
[7] Wescott *v.* Archer, 12 Nebraska, 345.
[8] Grebe *v.* Jones, 15 Nebraska, 312.
[9] Warren *v.* Dick, 17 Nebraska, 241.

statute required was made out and published, bearing date November 23, 1843, and stating that the writ was issued on the 12th of June, 1843, and was "returnable to the second Tuesday after the first Monday in November *next*," instead of *instant*. It was regarded as a mere clerical mistake, which would not mislead, and did not vitiate the proceeding.[1] So, where the publication was erroneous in the name of the plaintiff, because of the insertion of a wrong initial of his middle name; it was considered not to invalidate the proceedings, but that the judgment was effective and conclusive between the parties, until reversed. And in the same case it was held, that the publication was not vitiated by reason of its stating that the term of court at which the defendant was required to appear was in August, 1887, instead of 1867; for the law fixing the time of holding the court was sufficient notice of the date.[2]

§ 441 *a*. If, at the time of the institution of a suit by attachment, the law require an order of publication to be made by the court, a subsequent statute requiring it to be made by the sheriff, but having in it no words indicating an intention in the legislature to give it a retroactive effect, will not invalidate an order made by the court.[3]

§ 442. In regard to the time of publication, where publication was required to be made for two months, it was held not sufficient to publish it for eight weeks.[4]

§ 443. Under a statute requiring notice to be published for four weeks successively, an affidavit was made stating that it had been so published, once every week, commencing on the 24th of April, and ending on the 5th of May; and it was held, that the statement that it had been published four weeks successively was sufficient, and the additional statement assigning the dates of the commencement and conclusion of the publication, was surplusage, and did not vitiate the previous general statement.[5]

§ 443 *a*. Under a statute prescribing a publication for four weeks successively, "the last insertion to be at least four weeks

[1] Drew *v.* Dequindre, 2 Douglas, 93.
[2] Morgan *v.* Woods, 33 Indiana, 23.
[3] Parsons *v.* Paine, 26 Arkansas, 124.
[4] Pyle *v.* Cravens, 4 Littell, 17; Lawlin *v.* Clay, Ibid. 283; Hunt *v.* Wickliffe, 2 Peters, 201.
[5] Swayze *v.* Doe, 13 Smedes & Marshall, 317.

before the commencement of the term," it was ruled, that this did not require that the four weeks should *end* before the term; but it was sufficient if the last insertion was four weeks before the term.[1] And where the statute required the publication to be "made for six consecutive weeks," it was held, that a publication first on November 8 and last on December 13, was complete.[2]

§ 444. Where the law provided that the defendant should be notified of the pendency of the attachment, by publication of a notice in a newspaper for four weeks successively; and, in case sixty days should not intervene between the first insertion of the notice and the first term of the court, the cause should be continued; it was held, that the proper rule for the computation of time in such case, was to exclude the day on which the notice was first inserted, and include the day on which the term commenced; and that a notice first inserted on the 27th of May, was not good for a term of court beginning on the 25th of July.[3]

§ 445. Where the law declared that no judgment should be entered on the attachment until the expiration of twelve months; during which time the plaintiff should cause notice of the attachment to be advertised three weeks successively in a public newspaper; publication at any time within the twelve months was considered sufficient.[4] And where the statute does not fix any time within which the publication shall be commenced, a delay of publication for two years and a half was not regarded as a sufficient ground for setting aside the attachment proceedings.[5]

§ 446. A common occurrence is for legislatures to change the times of holding courts. Where by any such law the term of a court is fixed for a time anterior to that at which it was formerly established, and the full time required by law for publication of notice is thereby abridged, no proceedings in the attachment suit, depending for their validity upon the correct publication of the notice, can properly be taken. Therefore, where the law required publication for six months, and after publication was ordered, the legislature passed a law requiring the court to be held at an earlier day than before, which allowed only four months for publication, and judgment was taken at the end of

[1] Haywood *v.* Russell, 44 Missouri, 252.
[2] Core *v.* Oil & Oil Land Co., 40 Ohio State, 636.
[3] Vairin *v.* Edmonson, 10 Illinois, (5 Gilman), 270; Forsyth *v.* Warren, 62 Ibid. 68.
[4] Harlow *v.* Becktle, 1 Blackford, 237.
[5] Matter of Clark, 3 Denio, 167.

four months, it was considered erroneous, and was reversed.[1] In Missouri, however, where the time of holding the court was changed, so as to bring the term forward, and the law provided that "all writs, process, and proceedings made returnable to the courts of either of the above-named counties shall be returnable to the courts held under this act;" an order of publication issued after the act took effect, requiring the defendant to appear at the time when the court was to be held under the previous act, but which was published the required number of times before the time fixed by the new act for holding the court, was sustained in a collateral contest of the validity of the judgment in the attachment suit.[2]

§ 446 *a*. All defects in the notice or in its publication are waived by the defendant's appearance and traverse of the allegations of the affidavit.[3] But this waiver cannot so set up void proceedings as to make them valid *ab initio* as against rights acquired by third persons in the property attached, between the time of the levy of the attachment and that of the sale of the property under execution issued on judgment obtained in the attachment suit. Thus, where an attachment was levied on real estate, and the defendant was not served, and the case was prosecuted to judgment on publication of notice to him; and after the sale of the land on execution, the defendant appeared and moved to set aside the judgment, not only because of the illegality of the publication, but because the judgment was rendered on insufficient evidence; this was held to be an appearance to the merits and a submission to the jurisdiction, which, so far as the defendant was concerned, might cure the original defects; but that it did not so validate the proceedings *ab initio* as to vitiate a conveyance of the land made by him during the pendency of the attachment suit.[4]

§ 446 *b*. A question arose in New York, as to the effect to be given in the courts of that State to a judgment rendered in Vermont against a garnishee there, for a debt to a defendant residing in New York, where no notice of the suit was given to the defendant. The case was this: M., a citizen of New York, was

[1] Saffaracus *v.* Bennett, 6 Howard (Mi.), 277; Colwell *v.* Bank of Steubenville, 2 Ohio, 229, 2d Edition, 377.

[2] Freeman *v.* Thompson, 53 Missouri, 183.

[3] Williams *v.* Stewart, 3 Wisconsin, 773.

[4] Anderson *v.* Coburn, 27 Wisconsin, 558.

hired by the Central Vermont Railroad Company to do work for it in New York, which was done, and the company became indebted to M., who sued the company in New York for the amount due. The company set up in defence a partial payment made by it, as garnishee of M., in a suit instituted against M. in Vermont; in which it appeared that no notice whatever, actual or constructive, was given to M. of the pendency of the suit; notwithstanding which the Vermont court rendered judgment against M. as defendant, and against the company as garnishee. The question presented in New York was, whether the payment made by the company under that judgment was a good defence *pro tanto* against M.'s action; and the court held it was not; because it had been made in violation of the fourteenth amendment of the Constitution of the United States, which says: "Nor shall any State deprive any person of life, liberty, or property without *due process of law.*" The court said: "Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this." [1]

§ 447. But a much more serious question than any that have been mentioned, arises when title is claimed under judgments in attachment cases, where there has been insufficient publication, or none at all. Upon this point, it was decided in Indiana, in an action of ejectment for the recovery of land, purchased at sheriff's sale in an attachment suit, that insufficiency of publication did not invalidate the proceedings so as to allow them to be impeached collaterally.[2]

§ 448. In Ohio, in a similar case, it was at one time held, that the fact of the notice required by statute not having been given, made the judgment and sale under it void, and that the purchaser at the sale acquired no title; [3] but the Supreme Court of that State afterwards reversed itself on this point, and held, that the proceedings of the court are not so invalidated by the failure to make publication, as to make the sale under them void.[4] And it is so ruled in Vermont,[5] New York,[6] Missouri,[7]

[1] Martin *v.* Central Vt. R. R. Co., 57 New York Supreme Ct. 347.
[2] Zeigenhagen *v.* Doe, 1 Indiana, 296.
[3] Warner *v.* Webster, 13 Ohio, 505.
[4] Paine *v.* Mooreland, 15 Ohio, 435. See Feild *v.* Dortch, 34 Arkansas, 399.
[5] Beech *v.* Abbott, 6 Vermont, 586.
[6] Matter of Clark, 3 Denio, 167.
[7] Hardin *v.* Lee, 51 Missouri, 241;

and Iowa,[1] and by the Supreme Court of the United States.[2] But in Maryland, a judgment rendered without notice, personal or constructive, to the defendant, or appearance by him, is wholly void, though property be attached.[3] And so in Illinois,[4] and Nebraska.[5] And in Michigan, under a statute in these words: "If a copy of the attachment shall not have been served upon any of the defendants, and none of them shall appear in the suit, the plaintiff, on filing an affidavit of the publication of the notice hereinbefore required for six successive weeks, may file his declaration in the suit, and proceed therein, as if a copy of such attachment had been served upon the defendants;" it was held, that where there was no personal service, the publication of notice was necessary to enable the court to obtain jurisdiction, and no judgment was valid without it, and no title passed through a sale made under it.[6] And in that State, where the statute required the notice to be published within thirty days after the return day of the writ, it was held, that if the publication did not take place within that time, though it was made afterwards, the court lost jurisdiction, and the attachment proceedings were void.[7] And in Wisconsin, strict compliance with the requirements of the law in regard to publication is considered necessary to the exercise of jurisdiction. Therefore, where the statute provided that "in all cases where publication is made, the complaint shall be first filed, and the summons as published shall state the time and place of such filing," a publication made before the complaint was filed was held not to authorize the court to take jurisdiction of the action, and that a judgment rendered upon such publication was void.[8] And where the statute required an order to be obtained from the court, or a judge thereof, for the publication, and that the first publication should be made within three months from the date of such order; the proceedings in an attachment case were vacated and dismissed, where the plaintiff took no legal steps therein for more than a year after the service of the attachment.[9]

Freeman *v.* Thompson, 53 Ibid. 183; Holland *v.* Adair, 55 Ibid. 40; Kane *v.* McCown, Ibid. 181; Johnson *v.* Gage, 57 Ibid. 160; Simmons *v.* Missouri P. R. Co., 19 Missouri Appeal, 542.

[1] Gregg *v.* Thompson, 17 Iowa, 107.

[2] Cooper *v.* Reynolds, 10 Wallace, 308.

[3] Clark *v.* Bryan, 16 Maryland, 171.

[4] Haywood *v.* Collins, 60 Illinois, 328.

[5] Wescott *v.* Archer, 12 Nebraska, 345, reversing Crowell *v.* Johnson, 2 Ibid. 146. See Grebe *v.* Jones, 15 Ibid. 312.

[6] King *v.* Harrington, 14 Michigan, 532.

[7] Millar *v.* Babcock, 29 Michigan, 526.

[8] Anderson *v.* Coburn, 27 Wisconsin, 558.

[9] Cummings *v.* Tabor, 61 Wisconsin, 185.

§ 448 *a*. In this connection cases should be noticed which grew out of the war of the Rebellion, though it is not supposable that their like will ever again arise in the history of this country.

No principle is more axiomatic than that no one shall be condemned in person or property without notice, and an opportunity to be heard in his defence. Such notice may be actual or constructive, as prescribed by law. Where actual notice is required personal service in a legal manner of a due process is a compliance with the requirement; and in cases where constructive notice is allowed, the duty of the moving party is fulfilled if he complies in every respect with the law, usage, or rule of practice, as the case may be, which prescribes that mode of service.[1]

That the general doctrines as to constructive notice might receive some modification in connection with the extraordinary circumstances of that war, was to have been expected.

What effect was due, in law, to notices by publication on one side of the military lines of the contending forces to parties on the other side?

This question came before the Supreme Court of the United States, first, in cases where there had been no attachment, and then in cases where title was claimed through attachment proceedings.

Of the former class, the first case was a bill in chancery to set aside a sale of stock in a corporation, made at Memphis, Tennessee, in 1863, under execution issued on a decree of foreclosure of a mortgage of the stock. There were three defendants in that decree, upon none of whom was there personal service of process, because all of them were within the Confederate lines; two of them having been, by the Union military authorities, ordered to remove south of the lines of the United States forces, and not to return; and the third having been within the Confederate lines during the entire contest. Publication of notice to them to appear was made in accordance with the laws of Tennessee existing prior to the rebellion; which was relied on as constructive notice to sustain the decree of foreclosure; but the court held, that its publication was "a mere idle form," since they could not lawfully see or obey it; and that the proceedings of foreclosure were, as to them, wholly void and inoperative.[2]

This doctrine was afterwards repeated in a case from Louisiana;

[1] Earle *v.* McVeigh, 91 U. S. 503.

[2] Dean *v.* Nelson, 10 Wallace, 158. See Dorr *v.* Rohr, 82 Virginia, 359.

where, upon mortgages of real estate, proceedings "by executory process" were instituted for the seizure and sale of the property. The proceedings were in accordance with the laws of the State, and under them the land was sold, and conveyed to the purchaser. All this occurred, however, after he had been ordered by the Union military authorities, to "leave New Orleans for the so-called Confederacy," and had done so, and gone to Mobile, where he remained until after the capture of that city by the Union forces. He then returned to New Orleans, and instituted proceedings to vacate those under which the land had been sold. The court held them, as in the former case, void and inoperative.[1]

It will be observed that in each of these cases there was nothing for the jurisdiction of the court to rest upon but the notice by publication. Strictly speaking, the decisions do not bear on cases of attachment, in which, as just seen, if the writ be lawfully issued and *levied on property*, the jurisdiction of the court is established *quasi in rem*, and a sale of the property under the attachment proceedings is not invalidated by the failure to make due publication. Whether, in a case of attachment, a notice by publication made on one side of the military lines to a party *forced by military orders* to go into and remain on the other side of those lines, would sustain the sale of the attached property, has not, so far as observed, been decided by the Supreme Court of the United States. But in a case in chancery, brought to set aside a sale of property made in an attachment proceeding, in which there was notice by publication, where it appeared that the defendant *had voluntarily left* Knoxville, Tennessee, shortly before the Union troops arrived there, and gone into the Confederate territory, and remained there; that court held, that the doctrine previously declared by it in the cases of mortgages did not apply; and the court said; "If a party voluntarily leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return to, or to hold communication with, the place where the proceedings are conducted. That would be carrying the privilege of *contra non volentem* to an unreasonable extent. We think it cannot be set up in this case."[2]

In a case, however, before the United States Circuit Court for the Western District of Virginia the question came up in direct

[1] Lasere *v.* Rochereau, 17 Wallace, 437. [2] Ludlow *v.* Ramsey, 11 Wallace, 581.

form, in a proceeding in equity to recover the amount of a promissory note executed before the war broke out by P., in Virginia, to D., in New York. Before the war, P. made an assignment to G., in Virginia, for the benefit of P.'s creditors. In 1861, this debt was confiscated by the Confederate authorities; and in August, 1862, G. paid the amount of it, in Confederate currency, to those authorities. Before that payment, one R. had sued out in Virginia an attachment against D., and garnished G., and gave notice thereof to D., by publication, in August, 1862; but took no further step in the case until after the war; when, without any renewed publication, he procured a judgment against G., as garnishee; but it does not appear that G. paid the judgment. In the equity proceeding, G.'s executrix relied on the payment made by G. under the decree of confiscation, and also on the judgment in the attachment case, claiming that the latter could not be collaterally impeached. But the court, holding that under the law of the State, due and legal publication was necessary to authorize the exercise of jurisdiction by attachment, decided that the publication made during the war was a nullity, and therefore that the judgment against the garnishee in the attachment suit was void, and said: "The publication was made during the war, when all intercourse or correspondence between the citizens of the belligerent States was interdicted. D. could not lawfully have received it, and if he had done so surreptitiously, he could not have obeyed the summons, and repaired to his defence before an insurrectionary tribunal. The question, therefore, arises whether a publication under such circumstances fulfils the requirements or intentions of the law. Had these transactions transpired in a time of peace, there can be no doubt of the validity of this judgment. But a publication *flagrante bello*, purporting to be notice to a citizen of a belligerent State, is 'a mere idle form; the party could not see or obey it.'" [1]

§ 448 *b*. Where the law required the clerk issuing an order of publication to designate the newspaper in which the order should be published, it was held, that the omission of the clerk to make such designation would not authorize the collateral impeachment of the judgment in the attachment suit.[2]

§ 449. But where no process is served on the defendant, nor property attached, nor garnishee charged, nor appearance entered, a judgment against the defendant, based on a publication

[1] Dorr *v.* Gibboney, 3 Hughes, 382.

[2] Kane *v.* McCown, 55 Missouri, 181.

of the pendency of the suit, will be void, and may be impeached collaterally, or otherwise, and forms no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it;[1] notwithstanding the statute law of the State expressly authorize a judgment to be rendered against a defendant under such circumstances.[2] In cases of this description, while a levy on property would justify the exercise of jurisdiction, and the garnishment of one indebted to the defendant would be regarded, *pro hac vice*, as equivalent to a levy,[3] yet the indebtedness of the garnishee must be *shown;* and a judgment rendered against a garnishee who does not appear and answer, and against whom, in such case, the statute authorizes judgment to be rendered for the whole amount of the judgment against the defendant, without proof of his indebtedness to the defendant, will not sustain the jurisdiction.[4]

§ 449 *a*. In cases where the property of the defendant is attached, but no service of process is had upon him, and publication is made, the plaintiff can take judgment for no more than the amount sworn to by him in the affidavit for obtaining the attachment and interest thereon, if it be an interest-bearing debt, and costs.[5] An in such cases, if the property attached be not sufficient to satisfy the judgment obtained, a further suit to recover the balance can only be maintained on the original cause of action; and in such further suit, the defendant may set up and rely upon any defence he could have interposed had no suit by attachment been brought; and the plaintiff cannot conclude the defence by producing the judgment in the attachment suit. That judgment is only conclusive of the fact that such a proceeding was had.[6]

[1] *Ante*, § 5; Eaton *v.* Badger, 33 New Hamp. 228; Carleton *v.* Washington Ins. Co., 35 Ibid. 162; Smith *v.* McCutchen, 38 Missouri, 415; Abbott *v.* Sheppard, 44 Ibid. 273; Bruce *v.* Cloutman, 45 New Hamp. 37; Cooper *v.* Smith, 25 Iowa, 269. In Kansas, where property was attached, but the sheriff's return did not show it to be the property of the defendant; and there was no service of process upon the defendant, but notice by publication; the judgment rendered in the case was held to be void, because such notice was available only when the plaintiff sought to subject the defendant's property to the payment of his claim; that the attachment of property of the defendant must affirmatively appear; and that the return did not show that any property of his had been attached. Repine *v.* McPherson, 2 Kansas, 340.

[2] Pennoyer *v.* Neff, 95 United States, 714.

[3] Thompson *v.* Allen, 4 Stewart & Porter, 184.

[4] Haggerty *v.* Ward, 25 Texas, 144.

[5] Henrie *v.* Sweasey, 5 Blackford, 273; Rowley *v.* Berrian, 12 Illinois, 198; Hobson *v.* Emporium R. E. & M. Co., 42 Ibid. 306; Forsyth *v.* Warren, 62 Ibid. 68.

[6] *Ante*, § 5. Bliss *v.* Heasty, 61 Illinois, 338.

§ 449 *b*. As between several different plaintiffs in attachment against a common defendant, we have seen the effect of changing or increasing the demand upon which an attachment was obtained.[1] In cases where the defendant is not served with process, but is notified by publication, it is of special moment, not only to other attaching creditors, but to the defendant, that his property should in any case be held answerable only for the claim for which the attachment was originally obtained. It is, therefore, wholly inadmissible for the plaintiff (at least without a new notice by publication of an amendment changing or enlarging the cause of action) to introduce a new cause of action; for the court has no power in such a case to render a judgment on a demand of which the defendant has no notice, actual or constructive.[2]

[1] *Ante*, § 282.

[2] Stewart *v.* Anderson, 70 Texas, 588; McRee *v.* Brown, 45 Ibid. 503.

CHAPTER XVIII.

GARNISHMENT. — GENERAL VIEWS. — DIVISION OF THE SUBJECT.

§ 450. We come now to that operation of an attachment, whereby property that cannot be seized may be reached by the process, and debts due to the defendant may be subjected to the payment of his debts. This latter is the sole and distinctive feature of attachment by the custom of London, from which, as before remarked, have sprung the systems of attachment laws in the United States.

§ 451. The peculiar operation of the process, by which effects of the defendant which cannot be seized and taken into custody may still be rendered liable to the payment of his debts, has received the designation of *garnishment*,[1] or warning, and the person in whose hands such effects are attached is styled *garnishee*, because of his being *garnished*,[2] or warned, not to pay the money or deliver the property of the defendant in his hands to him, but to appear and answer the plaintiff's suit.[3] This designation exists in all the States, except some in New England, where the party so warned is called *trustee*, and the process under which he is warned is called *trustee process*. In Vermont and Connecticut, he is also sometimes called *factor*, and the process, *factorizing process*. The terms *garnishment* and *garnishee*, being, however, so nearly of universal use, will be retained throughout this work.

§ 451 *a*. Throughout the United States garnishment is a purely statutory proceeding, and cannot be pushed in its operation beyond the statutory authority under which it is resorted to.

[1] In Kelham's Norman Dictionary the original of this term is given, as follows: GARNER, GARNISHER, to warn, to summons. GARNISHEMENT, GARNISSEMENT, GARNISHANT, GARNEYSEINT, warning, summons, notice.

[2] This being the first instance of the use of this word in this book, I deem it proper to remark, that I have studiously avoided the very prevalent corruption of it into "garnisheed," which disfigures the Reports of this country. I have, with equal care, shunned the displacement of the words "garnish" and "garnishing," by "garnishee" (used as a verb), and "garnisheeing."

[3] Priv. Londini, 256; Comyns's Digest, Attachment, E.

Thus, unless the statute expressly so provide, no effects of the defendant, coming into the garnishee's hands, or indebtedness accruing from the garnishee to the defendant, *after the garnishment*, are bound thereby.[1] So, if a garnishee die before he has answered, his administrator cannot be required, unless by express statute, to take his place and answer the interrogatories propounded by the plaintiff.[2] So, where a Safe Deposit Company was summoned as garnishee of one who rented a safe in its vaults, the contents of which did not appear; and the court was asked to order the garnishee to open the safe and file an inventory of its contents; the order was refused because there was no authority in the court for such a proceeding.[3] So, where a bank was garnished, in whose vault was a small trunk, deposited there by the defendant, of the contents of which no officer of the bank had any knowledge; it was held, that the garnishee could not be charged, because it did not appear that the trunk contained attachable effects; and the court, while recognizing the English doctrine, that an officer, in the service of an execution, may break open the defendant's private trunk, for the purpose of selling the contents, if they are liable to execution, yet said that the officer must first obtain lawful possession of the trunk; and to that the court could not help him in the pending case.[4] So, where it was sought to charge one as garnishee of A., on account of a debt due from the garnishee to the firm of A. & B., and the court was asked to cite A. and B. to appear and litigate their respective rights in the debt, so as to enable the plaintiff to show that, in fact, B. had no interest in the debt, the request was refused, because the attachment law did not authorize such a proceeding.[5]

[1] *Post*, § 667; Bliss *v.* Smith, 78 Illinois, 359; Hoffman *v.* Fitzwilliam, 81 Ibid. 521; Sievers *v.* Woodburn, S. W. Co., 43 Michigan, 275; Burlington & M. R. R. Co. *v.* Thompson, 31 Kansas, 180; Excelsior B. & S. Co. *v.* Haines, 5 Penn. County Court, 631.

[2] Tate *v.* Morehead, 65 North Carolina, 681. See Welch *v.* Gurley, 2 Haywood, (N. C.), 334; Gee *v.* Warwick, Ibid. 354; White *v.* Ledyard, 48 Michigan, 264; Brecht *v.* Corby, 7 Missouri Appeal, 300.

[3] Gregg *v.* Nilson, 1 Legal Gazette R. 128; 8 Philadelphia, 91. In New York, an order by the court to the sheriff to open a safe and tin box in possession of such a company, and in which it was claimed that there was property of the defendant, was sustained, as necessary to enable the sheriff to execute the writ. United States *v.* Graff, 67 Barbour, 304.

[4] Bottom *v.* Clarke, 7 Cushing, 487. But in Georgia, where a box was deposited by the defendant in the garnishee's store, without any liability being assumed by the latter in reference to it; and after the garnishment he permitted the defendant to remove it; he was charged as garnishee for the value of its contents, upon the value being proved. Loyless *v.* Hodges, 44 Georgia, 647.

[5] Sheedy *v.* Second Nat. Bank, 62 Missouri, 17.

§ 451 *b*. Garnishment rests wholly on judicial process, and depends on the due pursuit of the steps prescribed by law for its prosecution. It can borrow no aid from volunteered acts of the garnishee. Such acts will be regarded as void, so far as they interfere with the rights of third parties. Thus, where, under a law requiring the garnishment process to be personally served on the garnishee, one acknowledged and accepted service by writing on the petition, it was held, that he had no right to do so, and that the acceptance or waiver of service was a nullity, as against other attaching creditors;[1] and equally so as against an assignee of the debt in respect of which the garnishee was charged.[2] So, where the statute prescribed that process should be served on a corporation by service on the president, or any director or manager thereof, an admission of service of garnishment by the attorney of a corporation was held insufficient to give the court jurisdiction of the corporation.[3] So, where no legal service of process had been made on a corporation as garnishee, and yet the secretary of the corporation appeared and answered, and made no objection to the sufficiency of the service; it was held that no judgment could be rendered against the corporation.[4] So, where a garnishment was made after the re-

[1] Schindler *v.* Smith, 18 Louisiana Annual, 476. The court said: "The garnishee, in the eyes of the law, is a mere stakeholder, a custodian of the property attached in his hands; he has no pecuniary interest in the matter; he has no cost to pay, and therefore none to save; his business is to let the law take its course between the litigants; he has no right to accept or waive service of the proceeding, thereby favoring one party at the expense and injury of another, and creating actually a privilege with priority in favor of one creditor to the prejudice of another." See Citizens Bank *v.* Payne, 21 Louisiana Annual, 380; Hodges *v.* Graham, 25 Ibid. 365; Phelps *v.* Boughton, 27 Ibid. 592; Woodfolk *v.* Whitworth, 5 Caldwell, 561; Gates *v.* Tusten, 89 Missouri, 13; Epstein *v.* Salorgne, 6 Missouri Appeal, 352; Connor *v.* Pope, 18 Ibid. 86; Nelson *v.* Sanborn, 64 New Hamp. 310; Insurance Co. *v.* Friedman, 74 Texas, 56. In Mississippi, a case is reported where there was no service of process upon the garnishee, but he appeared and answered, and the court took action on his answer; but it does not appear that any question as to the legality of the proceeding was raised; and the case cannot therefore be considered as militating against the position taken in the text. Roy *v.* Heard, 38 Mississippi, 544. In Vermont, where the "trustee process" has the character and effect of a summons, it was decided that service thereof on a trustee [garnishee] by his accepting service, is valid to hold the funds in his hands as against a subsequent assignee. Cahoon *v.* Morgan, 38 Vermont, 234. In Texas, it was held, that the doctrine stated in this section does not apply in the suit of a creditor against the garnishee himself, on his answer, when he has voluntarily appeared before the officer, and no rights of an opposing creditor are involved. Freeman *v.* Miller, 51 Texas, 443.

[2] Hebel *v.* Amazon Ins. Co., 33 Michigan, 400.

[3] Northern Central R. Co. *v.* Rider, 45 Maryland, 24.

[4] Raymond *v.* Rockland Co., 40 Conn. 401. See McDonald *v.* Moore, 65 Iowa, 171; Haley *v.* H. & St. J. R. Co., 80 Missouri, 112; Fletcher *v.* Wear, 81 Ibid.

turn day of the writ, and the garnishee appeared and answered, and judgment was rendered against him; it was decided, that the process under which he was summoned had no validity; that he therefore stood as though he had voluntarily appeared and answered interrogatories without notice; and the judgment against him was set aside as against other creditors.[1] But where a writ was issued on the 28th of April, and named as the return day April 10th of the same year, and the garnishee appeared and answered on the 10th of May; it was considered, that the return day named in the writ was obviously a mere clerical error which did not invalidate the proceedings, and that the appearance and answer of the garnishee was a waiver of the error.[2]

§ 451 *c*. Garnishment is a process, not a pleading, and serves its purpose when it brings the garnishee before the court. If there are defects in the process, they are the subject of a motion to quash,[3] or of a plea in abatement, and cannot be reached by demurrer.[4]

§ 451 *d*. In garnishment as in the case of a levy on property,[5] it is the return of the officer upon the writ which constitutes the attachment of the defendant's property in the garnishee's possession, or of the debt due from the garnishee to the defendant; and the proceeding will fail if the return do not show a garnishment in conformity to the statute. In Missouri the statute provided, as to service and return, as follows: —

"When goods and chattels, money, or evidences of debt are to be attached, . . . if not accessible, the officer shall declare to the person in possession thereof that he attaches the same in his hands, and summon such person as garnishee.

"When the credits of the defendant are to be attached, the officer shall declare to the debtor of the defendant, that he attaches in his hands all debts due from him to the defendant, . . . and summon such debtor as garnishee."

Under this statute an officer returned upon a writ of attachment that he had "served the writ by summoning A. as gar-

524; Farmer *v.* Medcap, 19 Missouri Appeal, 250; Insurance Co. *v.* Friedman, 74 Texas, 56.

[1] Southern Bank *v.* McDonald, 46 Missouri, 31. See Desha *v.* Baker, 3 Arkansas, 509.

[2] Wellover *v.* Soule, 30 Michigan, 481.

[3] Stevens *v.* Dillman, 86 Illinois, 233.

[4] Curry *v.* Woodward, 50 Alabama, 258.

[5] *Ante*, § 205.

nishee, to appear and answer touching his indebtedness to B. the defendant;" and the return was held insufficient to constitute an attachment of anything in the garnishee's hands, and therefore that the court, as to him, acquired no jurisdiction.[1]

So, where the statute authorized notice of garnishment to be served on a railroad corporation "by delivering the same to the nearest station or freight agent of such corporation in the county in which the cause of action is pending," and the officer returned that he had garnished a railroad company "by delivering a copy of the notice to D. W. S., nearest agent of the H. & St. J. R. Co;" it was held, that the company could not be charged as garnishee because it did not appear by the return that the agent upon whom service was had was either a station or freight agent.[2]

§ 452. Garnishment is in the nature of a proceeding *in rem*, since its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of his claim against the defendant, property of the defendant's in the garnishee's hands, or a debt due from the garnishee to the defendant.[3] It is, in effect, a suit by the defendant, in the plaintiff's name, against the garnishee, without reference to the defendant's concurrence, and, indeed, in opposition to his will. Hence the plaintiff usually occupies, as against the garnishee, just the position of the defendant, with no more rights than the defendant had, and liable to be met by any defence which the garnishee might make against an action by the defendant.[4] Where, however, the garnishee holds property of the defendant under a fraudulent transfer or arrangement, the right of the plaintiff to hold the garnishee is not limited by the defendant's right against the latter. And there are other cases, as we shall hereafter see, in which a garnishee may be held, though the defendant could not at the time of the garnishment maintain an action against him.[5]

Garnishment is not only in effect a suit by the defendant in the plaintiff's name against the garnishee, but it has been held

[1] Nowell *v.* Porter, 62 Missouri, 309. See Keane *v.* Bartholow, 4 Missouri Appeal, 507; Epstein *v.* Salorgne, 6 Ibid. 352, Connor *v.* Pope, 18 Ibid. 86; Swallow *v.* Duncan, Ibid. 622; Todd *v.* Missouri P. R. Co., 33 Ibid. 110.

[2] Haley *v.* H. & St. J. R. Co., 80 Missouri, 112. See Gates *v.* Tusten, 89 Ibid. 13; Mangold *v.* Dooley, Ibid. 111.

[3] In Strong *v.* Smith, 1 Metcalf, 476, the Supreme Court of Massachusetts said: "The trustee process operates as a species of compulsory statute assignment, by which a creditor may obtain that by operation of law which his debtor might voluntarily assign to him in payment of his debt." See Campbell *v.* Nesbitt, 7 Nebraska, 300; Sears *v.* Thompson, 72 Iowa, 61.

[4] Daniels *v.* Clark, 38 Iowa, 556; Mooney *v.* U. P. R. Co., 53 Ibid. 346.

[5] *Post*, § 464.

to be in fact, a suit, in the legal acceptation of the term. In Alabama, garnishment was regarded as a suit, where an administrator was garnished within six months after grant of letters of administration, and the proceeding was objected to, because of a statutory provision which declared that "no suit must be commenced against an administrator as such, until six months after the grant of letters of administration." [1] In the Circuit Court of the United States for Arkansas, the question came up in this shape. A., a citizen of Arkansas, recovered judgment in that court against B., a citizen of Texas, and issued execution thereon, under which, in conformity with a statute of Arkansas, C., a citizen of that State, was summoned as garnishee. The question was, whether, as the plaintiff and the garnishee were citizens of the same State, the court had jurisdiction of the proceeding. If the garnishment was a suit, it came within the provision prohibiting the court from taking jurisdiction of a suit between citizens of the same State. The court, in the following terms, held it to be a suit: "The proceeding must be regarded as a civil suit, and not as a process of execution to enforce a judgment already rendered. It may be used as a means to obtain satisfaction of a demand, in the same manner as a suit may be resorted to on a judgment of another State, with a view to coerce the payment of such judgment. In this proceeding the parties have day in court; an issue of fact may be tried by a jury, evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment. It is in every respect a suit, in which the primary object is to obtain judgment against the garnishee, and certainly cannot with any plausibility be treated as process of execution, or as part of the execution process; for if so, there could be no necessity or propriety in resorting to this forum to investigate the relations of debtor and creditor." [2]

Garnishment being a suit, it is the right of the plaintiff to dismiss or discontinue it at any time before verdict; and the garnishee has no right to object to the dismissal.[3]

§ 452 *a*. Garnishment cannot be extended in its operation so as to charge a garnishee on account of property of the defendant

[1] Moore *v.* Stainton, 22 Alabama, 831; Travis *v.* Tartt, 8 Ibid. 574; Edmonson *v.* DeKalb County, 51 Ibid. 103. See Thorn *v.* Woodruff, 5 Arkansas, 55; Gorman *v.* Swaggerty, 4 Sneed, 560; Jones *v.* New York & Erie R. R. Co., 1 Grant, 457; Malley *v.* Altman, 14 Wisconsin, 22; Caldwell *v.* Stewart, 30 Iowa, 379; Delacroix *v.* Hart, 24 Louisiana Annual, 141; Dewey *v.* Garvey, 130 Mass. 86.

[2] Tunstall *v.* Worthington, Hempstead, 662. *Sed contra*, Kidderlin *v.* Myer, 2 Miles, 242.

[3] Griel *v.* Loftin, 65 Alabama, 591.

which, at the time of the garnishment, is not within the sphere of the jurisdiction of the court issuing the process. The service of the process confers jurisdiction of the garnishee personally, so far as to require him to answer; but when it shall appear by his answer, or otherwise, that the *res* in his possession or under his control is out of the jurisdictional sphere of the court, no judgment can be rendered against him in respect thereof, and he must be discharged.[1]

§ 453. Garnishment is an effectual attachment of the effects of the defendant in the garnishee's hands,[2] differing in no essential respect from attachment by levy, except that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a lien as gives him the right to hold the garnishee personally liable for it or its value,[3] and to restrain the garnishee from paying his debt to the defendant.[4] The defendant's rights in the property in the garnishee's hands are so far extinguished, as to prevent the defend-

[1] *Post*, § 474; Lawrence *v.* Smith, 45 New Hamp. 533; Western R. R. *v.* Thornton, 60 Georgia, 300; Sutherland *v.* Second Nat. Bk., 78 Kentuky, 250; Penn. R. R. Co. *v.* Pennock, 51 Penn. State, 244; Wheat *v.* P. C. & Ft. D. R. R. Co., 4 Kansas, 370; Bates *v.* C. M. & St. P. R. Co., 60 Wisconsin, 296; Tingley *v.* Bateman, 10 Mass. 343; Montrose P. Co. *v.* Dodson & H. M. Co., 76 Iowa, 172; Bowen *v.* Pope, 26 Illinois Appellate, 233; 125 Illinois, 28; Insurance Co. *v.* Friedman, 74 Texas, 56.

[2] Kennedy *v.* Brent, 6 Cranch, 187; Parker *v.* Kinsman, 8 Mass. 436; Blaisdell *v.* Ladd, 14 New Hamp. 129; Burlingame *v.* Bell, 16 Mass. 318; Swett *v.* Brown, 5 Pick. 178; Tindell *v.* Wall, Busbee, 3; Tillinghast *v.* Johnson, 5 Alabama, 514; Thompson *v.* Allen, 4 Stewart & Porter, 184; Bryan *v.* Lashley, 13 Smedes & Marshall, 284; Watkins *v.* Field, 6 Arkansas, 391; Martin *v.* Foreman, 18 Ibid. 249; Hacker *v.* Stevens, 4 McLean, 535; Safford *v.* Nat. Bank, 61 Vermont, 373.

[3] Walcott *v.* Keith, 2 Foster, 196; Moore *v.* Holt, 10 Grattan, 284; Johnson *v.* Gorham, 6 California, 195; McConnell *v.* Denham, 72 Iowa, 494; Booth *v.* Gish, 75 Ibid. 451; McGarry *v.* Lewis Coal Co., 93 Missouri, 237. It is a common expression by courts, that by garnishment the plaintiff acquires a lien on the debt due from the garnishee to the defendant; but perhaps the view stated in the text is the more proper one. In Illinois it was held, that garnishment imposes no lien upon the effects in the garnishee's hands, and does not put them in *custodia legis*. Bigelow *v.* Andress, 31 Illinois, 322. But see Smith *v.* Clinton Bridge Co., 13 Bradwell, 572. In South Carolina, on the other hand, the Court of Appeals said: "Our opinion is, that an actual seizure is not essential to create the attachment lien, but that the service of the writ on one in whose custody or control the assets of the absent debtor may be, is sufficient to make the whole assets in his hands secure and liable in law, to answer any judgment that shall be secured and awarded upon that process." Renneker *v.* Davis, 10 Richardson Eq. 289. In Vermont, garnishment was termed an "inchoate lien." Wilder *v.* Weatherhead, 32 Vermont, 765. See *In re* Peck, 16 Nat. Bankruptcy Register, 43.

[4] Parker *v.* Farr, 2 Browne, 331; Parker *v.* Parker, 2 Hill Ch'y, 35.

ant's making any disposition of it which would interfere with its subjection to the payment of the plaintiff's demand, when that shall have been legally perfected; but for every purpose of making any demand which may be necessary to fix the garnishee's liability to him, or of securing it by legal proceedings or otherwise, his rights remain unimpaired by the pending garnishment, but of course can be exercised only in subordination to the lien thereby created.[1] From the time of the garnishment, the effects in the garnishee's possession are considered as *in custodia legis*, and the garnishee is bound to keep them in safety, and, it was said by the Supreme Court of the United States, is not at liberty to change them, to convert them into money, or to exercise any act of ownership over them.[2] He acquires a special property in them, as agent of the court,[3] and is entitled to hold them, until the question of his liability is determined, as well against the defendant as against any subsequent purchaser or pledgee;[4] even though the attachment be against a person other than the ostensible owner from whom the garnishee received them.[5] He has no right to deliver to the defendant or other person any of the effects of the latter which were in his hands when he was garnished, or which came into them afterwards, if the attachment legally binds effects subsequently received by him;[6] nor can they be lawfully levied on and taken out of his possession;[7] but if that should be done, the officer seizing must hold them subject to the lien of the creditor who effected the garnishment.[8] If so taken,[9] or if taken from him by a wrong-doer,[10] it will not discharge the garnishee's liability; but it may furnish ground for delaying proceedings until damages can be recovered of the party taking them.[11] But if the garnishing plaintiff cause a levy and sale under execution to be made of the

[1] Hicks *v.* Gleason, 20 Vermont, 139; Bank of the State of Missouri *v.* Bredow, 31 Missouri, 523. See Gause *v.* Cone, 73 Texas, 239.

[2] Brashear *v.* West, 7 Peters, 608; Mattingly *v.* Boyd, 20 Howard Sup. Ct. 128; Biggs *v.* Kouns, 7 Dana, 405; Beames *v.* Winter, 41 Kansas, 596. See Staniels *v.* Raymond, 4 Cushing, 314, where, under the Massachusetts statute, a view is entertained, which, so far as that State is concerned, materially modifies the garnishee's position.

[3] Erskine *v.* Staley, 12 Leigh, 406.

[4] Walcott *v.* Keith, 2 Foster, 196.

[5] Stiles *v.* Davis, 1 Black, 101.

[6] Aldrich *v.* Woodcock, 10 New Hamp. 99; Parker *v.* Parker, 2 Hill Ch'y, 35; Loyless *v.* Hodges, 44 Georgia, 647; Stevens *v.* Dillman, 86 Illinois, 233; Adams *v.* Penzell, 40 Arkansas, 531.

[7] *Ante*, § 251; Scholefield *v.* Bradlee, 8 Martin, 495; Erskine *v.* Staley, 12 Leigh, 406.

[8] Burlingame *v.* Bell, 16 Mass. 318; Swett *v.* Brown, 5 Pick. 178.

[9] Parker *v.* Kinsman, 8 Mass. 486.

[10] Despatch Line *v.* Bellamy Man. Co., 12 New Hamp. 205.

[11] Despatch Line *v.* Bellamy Man. Co., 12 New Hamp. 205.

property, he cannot afterwards hold the garnishee in respect thereof.[1]

§ 453 *a*. The position taken by the Supreme Court of the United States, as stated in the next preceding section, that the garnishee is bound to keep the effects in his hands safely, and is not at liberty to change them, to convert them into money, or to exercise any act of ownership over them, must be understood with reference to the facts of the case before that court. There the property in the garnishee's hands was merchandise; concerning which, in the particular case, the position taken was undoubtedly correct. But that rule is not capable of universal application. Thus, where goods were consigned to a factor for sale, on which he had made advances, and after making them he was summoned as garnishee of the consignor; the question was as to the amount for which he should be charged. At the time of the garnishment the goods were worth $1,856; but he thereafter sold them for $1,260. No fraud in the sale was alleged. The plaintiff contended that the former sum should be the measure of the garnishee's liability: which brought up the question whether the garnishment arrested the factor's power to sell the goods. If it did, the liability of the garnishee was for the larger sum; otherwise for the smaller. It was held, that the power of sale was not cut off.[2] And where the attachment of

[1] Goddard *v.* Hapgood, 25 Vermont, 351; Clapp *v.* Rogers, 38 New Hamp. 435; Claflin *v.* Landecker, 17 Missouri Appeal, 615; Valentine *v.* Landecker, 20 Ibid. 60.

[2] Baugh *v.* Kirkpatrick, 54 Penn. State, 84. The court said: "It is contended the attachment arrested their power to sell, leaving the goods tied up in their hands. We cannot assent to this. We are bound to take notice of the general usages governing the contracts of factors and commission merchants. By the order to sell, and advances made by the factors, an interest was acquired in the goods with a right to sell, which could not be affected by an after-attachment. It would be deleterious to trade, and the rights of those engaged in it, to hold that goods forwarded to a factor to be sold, may be tied up in his hands until the creditor of the consignor is ready to proceed with his execution to convert them. . . . The attaching creditor stands upon no higher footing than his debtors in relation to the garnishee. What right would the debtor himself have to say to the garnishee, 'You shall not sell,' without tendering him his advances and making him whole? Even an execution cannot be levied of goods in pawn, so as to take them out of the pawnee's possession, without tendering him the money for which he holds them in pledge. So here the garnishees, as factors to sell, having made advancements, had a power coupled with an interest, which was irrevocable except upon a tender of their charges. Added to the injury to them by protracted storage, a fall in price might leave their advances partially unprotected. If the plaintiff was desirous to retain the goods for an advance in price, it was his duty to furnish the money to relieve them of the lien of the garnishees, and to direct the sheriff to take them into custody."

choses in action is authorized by statute, the rule laid down by the Supreme Court of the United States would hardly seem capable of strict application. In Missouri this is authorized, and a garnishee may there be charged in respect of *choses in action* in his hands belonging to the defendant. In a case which arose there, a bank was summoned as garnishee, having in its possession, for collection, a bill of exchange belonging to the defendant, upon which it brought suit against the acceptor; who set up the garnishment of the bank as a bar to its right to maintain an action on the bill; but it was held, that the bank's right of action was not lost by the fact of the garnishment.[1]

§ 453 *b*. Garnishment cannot be extended in its operation beyond the mere point of reaching the defendant's effects in the garnishee's hands. It creates no lien on the real or personal estate of the garnishee. A judgment, therefore, against the personal representatives of a garnishee who had died during the pendency of the proceedings, does not relate back to the time of serving the attachment, nor bind the garnishee's estate;[2] nor does it give the attaching creditor a preference over other creditors of the garnishee's estate.[3]

§ 453 *c*. Garnishment cannot grasp expectancies or contingent interests. Therefore, where it was attempted to reach by garnishment, the interest of a devisee in the estate of a testator, which might never become legally vested in her during her lifetime, the court, while holding that what has a present and certain existence, although its possession and enjoyment may be postponed for a time, may be reached by garnishment, yet refused to sustain the attempt to reach the devisee's interest through that process.[4]

§ 454. Garnishment cannot be supplemented by injunction or other proceeding in equity, nor can any distinct proceeding, not authorized by statute, be based on the garnishment, to obtain security for the payment of the judgment which may be recovered against the garnishee. Thus where, in a proceeding in chancery, certain parties were garnished, and afterwards the

[1] Bank of the State of Missouri *v.* Bredow, 31 Missouri, 523. See Brown *v.* Scott, 51 Penn. State, 357; Patterson *v.* Hankins, 9 Philadelphia, 105.

[2] Parker *v.* Parker, 2 Hill Ch'y, 35.

[3] Parker *v.* Farr, 2 Browne, 331.

[4] Patterson *v.* Caldwell, 124 Penn. State, 455. See Day *v.* New England L. I. Co., 111 Ibid. 507.

complainant filed a supplemental bill, suggesting that they were bankrupt, and had sent large quantities of their goods to certain parties for sale at auction, and that, if the proceeds of the sale of the goods should be paid to the garnishees, they would contrive so to dispose of them, that the complainant would lose all benefit of the decree; and the court thereupon granted a restraining order on the auctioneers; and upon their answering, showing the balance remaining in their hands, they were, on the final hearing, decreed to pay it to the complainant; it was held, that the proceeding was unauthorized.[1] So where, in a suit in favor of A. against B., in a Circuit Court of the United States, C. was garnished; against whom a suit by B. was then pending in a State court, in which judgment was afterwards rendered, and execution issued thereon, against C.; and thereupon A. sought an injunction to restrain proceedings under the execution until C. should answer in the United States court, and the question of his liability as garnishee should be passed upon by that court; the injunction was refused, not only because the jurisdiction of the State court had first attached, but because it was no case for equitable interposition in aid of the garnishment.[2] And it has likewise been held, that garnishment will not sustain a bill in equity to restrain the garnishee from disposing of the defendant's property in his hands, until the plaintiff could obtain judgment and execution against the garnishee.[3] Much less is there any authority for a Court of Chancery to attach a debt due to a debtor of the defendant, and apply it to the payment of the defendant's debt.[4] And under a judgment rendered against one as garnishee, out of whom nothing can be made on execution, it is held in Illinois, that there can be no proceeding by garnishment of his debtors, unless the law expressly authorize it; the proceeding must stop with the debtor of the defendant.[5]

§ 454 *a*. Garnishment can have no retroactive effect, so as to affect prior completed transactions between the garnishee and the defendant, or to subject the former to liability on account of

[1] Wolf *v.* Tappan, 5 Dana, 361. See Godding *v.* Pierce, 18 Rhode Island, 532.

[2] Arthur *v.* Batte, 42 Texas, 159; Noyes *v.* Brown, 75 Ibid. 458.

[3] Bigelow *v.* Andress, 31 Illinois, 322. In New Hampshire, in an attachment proceeding in equity, a bill to restrain a garnishee from fraudulently putting his property beyond the reach of legal process in order to prevent the collection of the judgment which he anticipates may be rendered against him as garnishee, was sustained. Moore *v.* Kidder, 55 New Hamp. 488.

[4] Jones *v.* Huntington, 9 Missouri, 249.

[5] Illinois C. R. R. Co. *v.* Weaver, 54 Illinois, 319.

property of the latter, which was in his hands previous to, but not at the time of, the garnishment. Thus, where the garnishee, prior to the garnishment, had had property of the defendant in his possession under a secret trust, which would have been void as against creditors; but before he was garnished he had delivered the property to the defendant; it was held, that he could not be charged.[1] And where garnishment was authorized under an execution, and the execution was a lien on the defendant's personalty from the time of its issue; it was held, that the garnishment did not relate back to that time, but took effect only from the date of its service, and could not defeat an intervening attachment, served between the time of the issue of the execution and that of the garnishment under it.[2]

§ 454 *b*. Garnishment can have no effect to overthrow trusts, in order to reach moneys supposed to belong to a debtor. Whatever money or property of the debtor is sought to be reached by this proceeding, must be his *absolutely*, disencumbered of any trust declared in his favor, or that of any other person. Thus, where a testator bequeathed to his son a sum of money "*for the support of himself and family, and for no other purpose;*" and a part of that sum had been recovered, and paid to the attorney of the son, in whose hands it was attached; the court held, that the money was a *trust fund* under the will, in which the son had no such absolute right as to authorize its being attached for his debts, either before or after it came into his hands. "The will," said the court, "should be carried out according to the intent of the testator. And we can have no possible doubt that it was his object to create the money in the hands of his son a trust fund for the use specified in the will. The testator not only used affirmative words, appropriate to create a trust fund, but he saw fit at the same time to add a negative. The words are, — 'for the support of himself and family, and *for no other purpose.*' To hold that under this will the son took the money absolutely as his own, and not as a trust fund, would be to pervert the use of language, and the obvious intent of the testator."[3]

A wife, by her will, gave to her husband the amount of money

[1] Bailey *v.* Ross, 20 New Hamp. 302. See Emerson *v.* Wallace, Ibid. 567; Bergman *v.* Sells, 39 Arkansas, 97. In Whittier *v.* Prescott, 48 Maine, 367, it was held, that one who had received a gratuitous gift of money, will not be chargeable therefor as garnishee of the donor, although the debt sued for existed prior to the gift, if the case does not disclose that the donor was insolvent or largely indebted.

[2] English *v.* King, 10 Heiskell, 666.

[3] White *v.* White, 30 Vermont, 338.

that her farm could be sold for, "to be prudently used if needed by him for his support during the remainder of his life; and should it not be used, or should there be any left after paying the expenses of sickness and funeral charges, to be divided among my children." The farm was sold, and payment made, partly in cash and partly in a mortgage to secure the unpaid portion of the purchase-money. In an action against the husband the wife's executor was garnished in respect of the money and note received by him from the sale of the farm. The court held him not chargeable, and said: "The intention of the testatrix was, to provide a fund for her husband's support during life, and that to be prudently appropriated according to his necessities. To effect the object of the bequest it must be regarded as a trust; . . . and the money and note in the hands of the executor cannot be taken by process of foreign attachment to pay the general indebtedness of the defendant." [1]

So, where lands were devised to trustees, upon the trust "to pay over all remaining rents and income in cash into the hands of my daughter J., in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said J.;" it was held, that the net income of the estate was not liable to garnishment in the hands of the trustees for her debts.[2]

So, where legacies left to one were given to her "expressly upon condition that they shall not be liable to be attached or seized for her debts, but that the whole amount shall be paid directly to her by my executor, without diminution," it was held to be a trust in the hands of the executor until actually paid to the legatee, and could not be attached for her debts.[3]

So, where property was devised to a trustee, "to hold upon trust, to collect and receive the rents and income, . . . and to pay the said rents and income . . . to and for the support and maintenance of my son C., during the term of his natural life, with the intent and purpose, that the said trustee may either pay the said income, or such portion thereof as he may think proper, into the hands of my said son, or disburse the same in such way as to the trustee may seem best for his comfortable maintenance; such payments and disbursements to be at all times at the sole and absolute discretion of the said trustee;" and the trustee was summoned as garnishee of C.; the court held, that to charge him would utterly defeat the intent of the testator in creating the

[1] Chase *v.* Currier, 63 New Hamp. 90.
[2] Steib *v.* Whitehead, 111 Illinois, 247.
[3] Beck's Estate, 133 Penn. State, 51.

trust, and he was therefore, and for other reasons, discharged.[1] So, a railroad company through its assistant treasurer deposited with a firm of brokers in New York city a sum of money, and took from them a receipt therefor in these words: "Received from J. M. C. R. $25,000 in trust, to apply the same to an equal amount of the coupons of the first mortgage bonds and consolidated mortgage bonds of the M. C. R. Co., in the order in which such coupons shall be presented to us for payment, after having been duly identified for payment at our office by stamp impressed thereon; the said money not to be subject to the control of said company, otherwise than for the payment of said coupons as above described." This money was part of a larger sum raised by the railroad company for the express purpose of paying the coupons on the bonds mentioned, and when received by the brokers was placed by them on their books to the credit of "Coupon trust account." When part of the sum had been paid out, an attachment against the M. C. R. Co. was laid in their hands; but it was held, that the transaction was an absolute and irrevocable appropriation of the fund deposited in trust, for the uses mentioned in the receipt, and that the attachment was subordinate to the rights of the holders of coupons under the trust.[2]

§ 454 *c*. But while the position is unquestionable, that garnishment can have no effect to *overthrow* trusts in order to reach moneys supposed to belong to a debtor, there is no obstacle to its reaching moneys held by a trustee, as income to be paid to a *cestui que trust*, where the instrument creating the trust contains no prohibition of alienation, nor any provision against liability for his debts, nor any terms limiting the income to defined uses. If it be a naked trust, to receive income and pay it over, the trustee may be charged as garnishee of the *cestui que trust* for any portion of income due him when the garnishment takes place, and, if the statute authorize, for any accruing afterward.[3]

§ 455. In garnishment, as in the case of a levy, attachments take precedence in the order of their service. The right of sev-

[1] Keyser *v.* Mitchell, 67 Penn. State, 473. See White *v.* Jenkins, 16 Mass. 62; Brigden *v.* Gill, Ibid. 522; Hall *v.* Williams, 120 Ibid. 344; Hinckley *v.* Williams, 1 Cushing, 490; McIlvaine *v.* Lancaster, 42 Missouri, 96; Lackland *v.* Garesché, 56 Ibid. 267; Banfield *v.* Wiggin, 58 New Hamp. 155; Haust *v.* Burgess, 3 Hughes, 560; Guardians, &c. *v.* Mintzer, 16 Philadelphia, 449.

[2] Rogers Locomotive Works *v.* Kelly, 26 New York Supreme Ct. 399; affirmed in 88 New York, 234.

[3] Girard L. I. & T. Co. *v.* Chambers, 46 Penn. State, 485; Estate of James McCann, 16 Philadelphia, 224.

eral attaching creditors, as between themselves, by virtue of their successive processes, to reach the effects of their common debtor in the hands of a garnishee, is a matter of strict law, and unless the creditor in the prior process perfects his right as against the garnishee, by obtaining final judgment that may be enforced in the manner provided by law, his process will fail to postpone or defeat the subsequent attachers in reaching such effects. Thus, where a garnishee, under an arrangement with the first of several attaching creditors and the defendant, paid his debt to such creditor, and the latter did not prosecute his suit to judgment against the garnishee and the defendant, the garnishee was held still liable to a subsequent attaching creditor, who completed his judgment, and whose process was served prior to such arrangement.[1] And so, if a junior attachment be first ripened into a judgment, that gives no right to priority of recourse against the garnishee, over a writ previously served.[2]

§ 455 *a*. It is not unusual for garnishments of the same person, on account of the same fund, to proceed from courts of different jurisdictions. In such a case there is no doubt that, for the purpose of applying the fund to the satisfaction of the plaintiff's demand, the court making the first garnishment has the full control of the fund; but beyond that its control does not extend; nor does it preclude a recognition of the second garnishment by a different court, which will bind the fund, subject, of course, to be defeated if the whole fund is called for under the first.[3] And where one has been subjected to garnishment in different jurisdictions, and makes known to the court in which he was last served the fact of the previous garnishment, that court will take such measures as it may deem expedient, to protect him from double liability, and at the same time to continue his responsibility to its authority, in the event of his release from that of the court in which he was previously garnished. In such a case the Supreme Court of Louisiana considered, that there should be a stay of proceedings for a seasonable time, or that the plaintiff should give proper security to the garnishee, to indemnify him against loss from the previous attachment.[4]

[1] *Ante*, § 262; Wilder *v.* Weatherhead, 32 Vermont, 765.

[2] Erskine *v.* Staley, 12 Leigh, 406; Moore *v.* Holt, 10 Grattan, 284; Talbot *v.* Harding, 10 Missouri, 350; Johnson *v.* Griffith, 2 Cranch, C. C. 199; Arledge *v.* White, 1 Head, 241.

[3] The Olivia A. Carrigan, 7 Federal Reporter, 507.

[4] Woodruff *v.* French, 6 Louisiana Annual, 62.

§ 455 *b*. In attachment cases conflicts of jurisdiction have arisen between State courts and Federal courts, the results of which require mention.

Section 915 of the Revised Statutes of the United States is in these words: —

"In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now [December 1, 1873,] provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process."

In the attachment law of the State of Missouri is the following section: —

"Where the same property is attached in several actions by different plaintiffs against the same defendant, the court may settle and determine all controversies which may arise between any of the plaintiffs in relation to the property, and the priority, validity, good faith, and effect of the different attachments, and may dissolve any attachment, partially or wholly, or postpone it to another, or make such order in the premises as right and justice may require."

In connection with these provisions this case arose in the U. S. District Court for the Western District of Missouri: The U. S. marshal, under an attachment issued out of that court, levied on property; and afterwards the same property was attached by garnishment of the marshal under process of a Missouri court in the hands of a sheriff; and after that, another attachment from the Federal Court was levied on the same property. The property was sold under the first attachment; after satisfying which there remained in the registry of the Federal Court a surplus; and the question as to the right to it was between the State attachment and the Federal. It was held by the U. S. District Court, and affirmed by the U. S. Circuit Court, that the State attachment gave the plaintiff therein a lien on the surplus, and such a standing in the United States court as enabled him to assert his rights there; and the surplus was awarded to him.[1]

In Louisiana a similar case arose, which went to the Supreme Court of the United States, and elicited a decision which is a finality of the question, so far as Federal courts are concerned.

[1] Bates *v.* Days, 5 McCrary, 342; 17 Federal Reporter, 167. See Patterson *v.* Stephenson, 77 Missouri, 329.

By Art. 207 of the Code of Civil Practice of that State it is declared that "no citation can issue, no demand can be made, no proceeding had, nor suit instituted on Sundays."

Notwithstanding this provision, certain creditors obtained from the clerk of the U. S. Circuit Court, on Sunday, writs of attachment against their common debtor; under which the U. S. marshal, on Sunday, levied on the defendant's goods in a store, and was in possession of the same when, on Monday morning, shortly after midnight, the sheriff of New Orleans came to the store with an attachment which had been issued out of a State court on the preceding Saturday, and attempted to levy the same on the same property, but was prevented by the marshal. Afterwards on the same Monday, between 8 and 10 o'clock, A. M., the sheriff received and sought to levy other attachments, but was in like manner prevented. The sheriff served notice of seizure, and subsequently process of garnishment upon the deputy marshal, who had executed the attachments from the U. S. court. Failing to subject the marshal as garnishee, the sheriff, by leave of the U. S. Circuit Court, made himself a party to the proceedings there, and proceeded against the marshal and the creditors for whom he had acted. On a regular trial it appeared that, at the time of the garnishment of the marshal, he was in possession of the property wrongfully *under an illegal writ*, and therefore was chargeable as an individual; and the Supreme Court held, that "it was competent for the U. S. Circuit Court, and having the power it was its duty, to hold the marshal liable as garnishee; and having in its custody the fund arising from the sale of the property, and all the parties interested in it before it, that court was bound to do complete justice between all the parties;" and the Circuit Court was ordered to give the plaintiff in the State court priority in the distribution of the proceeds of the sale of the attached property.[1]

§ 456. After the foregoing general remarks, the first inquiry naturally presenting itself is for general principles regulating the liability of garnishees. This liability may result, as we shall hereafter fully see, either from the possession by the garnishee, when summoned, of personal property belonging to the defendant, or from his being at that time indebted to the defendant. It will therefore at once be apparent, that many questions must arise, as to the nature and condition of the property in the garnishee's hands, and the nature, extent, and qualifying

[1] Gumbel *v.* Pitkin, 124 U. S. 131.

circumstances of his liability as a debtor of the defendant, necessarily involving the determination of many legal principles. These questions will be considered in their appropriate order: at present it is important to lay the groundwork of general principles.

§ 457. It is necessary, in the first place, to bear in mind, that, wherever the distinction exists between common-law and chancery jurisdiction, courts of law cannot undertake, by garnishment, to settle equities between the parties, in order to subject an equitable demand which the defendant may have against the garnishee, to the payment of the defendant's debt. Where this distinction does not exist, and both branches of jurisdiction are, as it were, fused into one, or where, as in some States, courts of chancery are vested with jurisdiction in attachment cases, the rule might be different. In courts of law, however, garnishment must be considered as a legal and not an equitable proceeding, and consequently the defendant's rights to the fund or property sought to be condemned must be legal, as contradistinguished from equitable. If this rule be departed from, there will be no stopping point, and we must go the full length, and claim that the equitable rights of the defendant may be attached by garnishment in a suit at law; and thus a court of law will become invested with cognizance of equitable rights, and therefore bound to ascertain and condemn them, however difficult the task may be, or however incompetent the powers of the court for this purpose.[1] Thus, where a garnishee was sought to be charged, on the ground that he was indebted to the defendant in respect of a partnership which had existed between them, but the accounts of which had not been settled, it was held, that the proceeding could not be sustained; that the partnership accounts could not be settled in that way, but only in equity.[2] And so, where A. transferred his stock of goods to B., and C. bought some of the goods from B., for which he was indebted to him; and C. was

[1] Harrell *v.* Whitman, 19 Alabama, 135; Thomas *v.* Hopper, 5 Ibid. 442; Harris *v.* Miller, 71 Ibid. 26; Hoyt *v.* Swift, 13 Vermont, 129; May *v.* Baker, 15 Illinois, 89; Webster *v.* Steele, 75 Ibid. 544; Perry *v.* Thornton, 7 Rhode Island, 15; Clarke *v.* Farnum, Ibid. 174; Williams *v.* Gage, 49 Mississippi, 777; Mass. Nat. Bank *v.* Bullock, 120 Mass. 86; Sheedy *v.* Second Nat. Bank, 62 Missouri, 17; Glass *v.* Doane, 15 Bradwell, 66.

[2] Burnham *v.* Hopkinson, 17 New Hamp. 259; Treadwell *v.* Brown, 41 Ibid. 12. Nor can the garnishment of one partner in an action against his copartner, authorize the attaching plaintiff to maintain a bill in equity against the latter for an account, so as to reach the debtor's interest in the partnership. Treadwell *v.* Brown, 43 New Hamp. 290.

summoned as garnishee of A.; and it was sought to charge him on the ground that the transfer of the goods to B. was fraudulent, and known to C. to be so; it was held, that C. could not be charged as garnishee in the absence of B. as a party.[1]

§ 458. A fundamental doctrine of garnishment is, that the plaintiff does not acquire any greater rights against the garnishee than the defendant himself possesses. When, therefore, the attachment plaintiff seeks to avail himself of the rights of the defendant against the garnishee, his recourse against the latter is limited by the extent of the garnishee's liability to the defendant.[2] This principle is subject, however, to an exception, where the garnishee is in possession of effects of the defendant under a fraudulent transfer from the latter. There, though the defendant would have no claim against the garnishee, yet a creditor of the defendant can subject the effects in the garnishee's hands to his attachment.[3]

§ 459. The plaintiff's right to hold a garnishee exists only so long as, in the suit in which the garnishment takes place, he has

[1] Hodges *v.* Coleman, 76 Alabama, 103.

[2] *Post*, § 660; Harris *v.* Phœnix Ins. Co., 35 Conn. 310; Myer *v.* Liverpool, L. & G. Ins. Co., 40 Maryland, 595; Tupper *v.* Cassell, 45 Mississippi, 352; United States *v.* Robertson, 5 Peters, 641; Waldron *v.* Wilcox, 13 Rhode Island, 518; Oregon R. & N. Co. *v.* Gates, 10 Oregon, 514; Richardson *v.* Lester, 88 Illinois, 55; National Bank *v.* Staley, 9 Missouri Appeal, 146; Fenton *v.* Block, 10 Ibid. 536; Fitzgerald *v.* Hollingsworth, 14 Nebraska, 188; Burlington & M. R. R. Co. *v.* Thompson, 31 Kansas, 180.

[3] Lamb *v.* Stone, 11 Pick. 527. This was an action on the case by a creditor against a person to whom it was alleged the debtor had made a fraudulent sale of his property. The court held, that the action could not be maintained, because, 1. If the sale was fraudulent, the property was liable to attachment, after, as well as before, the sale; and 2. If the property could not be come at to be attached specifically, it might be reached in the purchaser's hands by garnishment. See United States *v.* Vaughan, 3 Binney, 394; Henry *v.* Murphy, 54 Alabama, 246; Lee *v.* Tabor, 8 Missouri, 322; Lackland *v.* Garesché, 56 Ibid. 267; Straass *v.* Ayers, 34 Missouri Appeal, 248. A striking instance of making a garnishee liable for money of a defendant, fraudulently obtained by him, was this: The directors of a corporation, in order to induce A. to become a member of the board, offered him one hundred shares of the stock of the corporation; and he accepted the same as full paid, but paid nothing therefor, and was elected a member of the board. In a few months, however, differences arose between him and the other directors, and by general consent he sold his stock to one of them for $1200; and his stock certificate was surrendered and cancelled, and a new certificate for the same stock was issued and delivered by the company to the purchaser. Thereafter A. was summoned as garnishee of the company; and the court held, that by a technical collusion with the directors he had become possessed of assets which the law holds sacred for the protection of creditors, and had made a profit from their conversion; and he might therefore be held as a debtor of the corporation. Eyerman *v.* Krieckhaus, 7 Missouri Appeal, 455.

a right to enforce his claim against the defendant. When his remedy against the latter is at an end, so is his recourse against the garnishee. That the latter may show that the plaintiff's right against him has been thus terminated, cannot be doubted. Thus, if a garnishee be summoned under an ancillary attachment, — one issued after the institution of an action by summons, and in aid thereof, — and the original action be dismissed, the ancillary attachment falls with it, and the garnishee is discharged; and the plaintiff cannot appeal from the judgment discharging him, if the judgment dismissing the main action be not appealed from.[1] So, where one was garnished under an execution, he was permitted to show by a previous execution in the same case, that the defendant had satisfied the judgment.[2] And where, by law, the death of a defendant, and a decree by the probate court of the insolvency of his estate, had the effect of dissolving an attachment levied on his property, it was held, that the lien acquired by a garnishment was thereby likewise destroyed.[3]

§ 459 *a*. The dissolution of the attachment operates a discharge of the garnishee, though the suit as a personal action be allowed by law to proceed against the defendant.[4]

§ 460. As the whole object of garnishment is to reach effects or credits in the garnishee's hands, so as to subject them to the payment of such judgment as the plaintiff may recover against the defendant, it results necessarily that there can be no judgment against the garnishee, until judgment against the defendant shall have been recovered.[5] The judgment against the defendant must be a lawful and valid one: if it be void, the judgment against the garnishee is also void.[6] And it must be a *final* one.

[1] Holek *v.* Phœnix Ins. Co., 63 Texas, 66.

[2] Thompson *v.* Wallace, 3 Alabama, 132; Price *v.* Higgins, 1 Littell, 274; Hammett *v.* Morris, 55 Georgia, 644.

[3] McEachin *v.* Reid, 40 Alabama, 410.

[4] *Ante*, § 411; Mitchell *v.* Watson, 9 Florida, 160.

[5] Gaines *v.* Beirne, 3 Alabama, 114; Leigh *v.* Smith, 5 Ibid. 583; Lowry *v.* Clements, 9 Ibid. 422; Bostwick *v.* Beach, 18 Ibid. 80; Case *v.* Moore, 21 Ibid. 758; Caldwell *v.* Townsend, 5 Martin, N. S. 307; Proseus *v.* Mason, 12 Louisiana, 16; Housemans *v.* Heilbron, 23 Georgia, 186; Rose *v.* Whaley, 14 Louisiana Annual, 374; Collins *v.* Friend, 21 Ibid. 7; Roberts *v.* Barry, 42 Mississippi, 260; Metcalfe *v.* Steele, Ibid. 511; Kellogg *v.* Freeman, 50 Ibid. 127; Erwin *v.* Heath, Ibid. 795; Washburn *v.* N. Y. & V. M. Co., 41 Vermont, 50; Withers *v.* Fuller, 30 Grattan, 547; Railroad *v.* Todd, 11 Heiskell, 549; Sun Mut. Ins. Co. *v.* Seeligson, 59 Texas, 3; Miller *v.* Anderson, 19 Missouri Appeal, 71.

[6] *Post*, § 696. Railroad *v.* Todd, 11 Heiskell, 549; Woodfolk *v.* Whitworth, 5 Coldwell, 561.

If appealed from by the defendant, there can be no judgment against the garnishee while the appeal is pending;[1] and if the judgment against the defendant be reversed, that against the garnishee must fall with it, and be likewise reversed.[2]

§ 460 *a*. In some States authority is given to a party claiming to own the debt in respect of which a garnishee is summoned, to intervene in the attachment suit, and assert his ownership of the debt, so as to prevent its subjection to the operation of the garnishment. In such case, the right of such intervention exists only so long as the attaching plaintiff seeks to charge the garnishee in respect of that debt. If the plaintiff abandons all right to charge the garnishee, the only judgment that the court can render is that the latter be discharged; it has no power, in that action, to settle the right of the intervening claimant to the debt.[3]

§ 461. In order to a recovery against a garnishee, it must be *shown affirmatively*, either by his answer or by evidence *aliunde*, that he has property of the defendant in his possession, of a description which will authorize his being charged, or that he is indebted to the defendant. The law will not presume him liable, nor will he be required to show facts entitling him to be discharged, until at least a *prima facie* case is made out against him. On the contrary, the rule is the other way, that he will be entitled to be discharged, unless enough appear to render him liable. In this respect he stands precisely in the position he would occupy if the defendant had sued him. A dictum of PARSONS, C. J., in 1807, very proper as applied to the case before him, but wholly erroneous as a general principle, — that "the trustees must be holden, unless sufficient matter appears in their answers to discharge them,"[4] created and kept alive in Massachusetts, for many years, a misconception of the true position of a garnishee, and of the principles upon which he should be held liable. Afterwards, however, the Supreme Court of that State, in an elaborate opinion, traced the rise and progress of that misconception, and finally settled the rule that the garnishee's liability should be affirmatively shown.[5]

[1] Emanuel *v.* Smith, 38 Georgia, 602.

[2] Rowlett *v.* Lane, 43 Texas, 274; Railroad *v.* Todd, 11 Heiskell, 549.

[3] Peck *v.* Stratton, 118 Mass. 406.

[4] Webster *v.* Gage, 2 Mass. 503.

[5] Porter *v.* Stevens, 9 Cushing, 530. See Lomerson *v.* Huffman, 1 Dutcher, 625; Williams *v.* Housel, 2 Iowa, 154; Farwell *v.* Howard, 26 Ibid. 381; Hunt *v.* Coon, 9 Indiana, 537; Reagan *v.* Pacific Railroad, 21 Missouri, 30; Karnes *v.* Pritchard, 36 Ibid. 135; Lane *v.* Felt,

§ 462. It is an invariable rule, that under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be in, if the defendant's claim against him were enforced by the defendant himself. This is necessary, in order to protect the garnishee's rights, as between him and the defendant, and to enable the garnishee to defend against a suit which the defendant might bring against him on the same liability for which he may have been held as garnishee.

§ 463. As to the general basis of a garnishee's liability, it will be found, on examination, that whatever else may, under particular statutes, authorize his being charged, there are two comprehensive grounds, common to every attachment system, viz., 1. His possession, when garnished, of personal property of the defendant, capable of being seized and sold on execution; and, 2. His liability, *ex contractu*, to the defendant, whereby the latter has, at the time of the garnishment, a cause of action, present or future, against him. In some States he may be charged in respect of real estate of the defendant in his hands; and in some, on account of *choses in action;* but aside from such special provisions, the language used in defining his liability, though varied, and often cumulative, will, on examination, be found to resolve itself, in each case, into those two general grounds; which may be considered as fully embraced in any system which provides no more than that one having "*goods, effects, or credits*" of the defendant in his possession may be charged as his garnishee. The addition of the word "money," or "chattels," or "property," or "rights," which is frequently found, or that of all of them, is not conceived to enlarge, in legal construction, the basis afforded by the comprehensive terms, "goods, effects, or credits." Hence the general applicability of the decisions in Massachusetts and Maine, where, under statutes using those words, it has been uniformly held, that, to charge a garnishee, the defendant must either have a cause of action against him, or the garnishee must have in his possession personal property belonging to the defendant, capable of being seized and sold on execution.[1] And the same rule prevails in New Hampshire and Vermont, where "any person having in his

7 Gray, 491; Driscoll *v.* Hoyt, 11 Ibid. 404; Richards *v.* Stephenson, 99 Mass. 311; Caldwell *v.* Coates, 78 Penn. State, 312.

[1] Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; White *v.* Jenkins, 16 Ibid. 62; Brigden *v.* Gill, Ibid. 522; Rundlet *v.* Jordan, 8 Maine, 47.

possession money, goods, chattels, rights, or credits" of the defendant, may be charged as garnishee.[1] And so in Michigan.[2] And where this possession exists, the possessor cannot escape the operation of the garnishment on the ground that the property for which it is sought to charge him might have been attached by levy.[3]

§ 464. The rule, as just stated, is qualified, in the case before referred to, of the garnishee's possession of effects of the defendant under a fraudulent transfer,[4] and is also subject to exceptions. For instance, where the garnishee has in his possession property, which, when he is summoned, could not be seized under attachment or execution, because not removable without material injury to it, — as hides in the process of tanning, — he may nevertheless be charged as garnishee in respect of such property, because he can hold it until it be in a condition to be delivered on execution.[5] So, an attorney-at-law, who has collected money for his client, may be held as garnishee of the client, though the latter have made no demand of payment; without which he could maintain no action against the attorney.[6] And in Maryland, though it is there held that a married woman cannot maintain a suit at law against her husband,[7] yet the husband of a woman carrying on business in her own name as a *sole trader* was charged as her garnishee, on an indebtedness to her for money she had earned in her business, and which had come into his hands.[8]

§ 465. Still the rule as stated may be considered generally applicable; and it follows thence, that, without express statutory warrant, one cannot be made liable as garnishee in respect of real estate of the defendant in his possession. In Maine,[9] Mas-

[1] Haven *v.* Wentworth, 2 New Hamp. 93; Adams *v.* Barrett, Ibid. 374; Piper *v.* Piper, Ibid. 439; Greenleaf *v.* Perrin, 8 Ibid. 273; Paul *v.* Paul, 10 Ibid. 117; Getchell *v.* Chase, 37 Ibid. 106; Hutchins *v.* Hawley, 9 Vermont, 295; Hoyt *v.* Swift, 13 Ibid. 129.

[2] Wilson *v.* Bartholomew, 45 Michigan, 41; Anderson *v.* Odell, 51 Ibid. 492.

[3] Brown *v.* Davis, 18 Vermont, 211.

[4] *Ante*, § 458.

[5] Clark *v.* Brown, 14 Mass. 271.

[6] *Post*, § 515; Staples *v.* Staples, 4 Maine, 532; Woodbridge *v.* Morse, 5 New Hamp. 519; Thayer *v.* Sherman, 12 Mass. 441; Riley *v.* Hirst, 2 Penn. State, 346; Mann *v.* Buford, 3 Alabama, 312; Corey *v.* Powers, 18 Vermont, 588; Quigg *v.* Kittredge, 18 New Hamp. 137.

[7] Barton *v.* Barton, 32 Maryland, 224.

[8] Odend'hal *v.* Devlin, 48 Maryland, 439.

[9] Moor *v.* Towle, 38 Maine, 133; Stedman *v.* Vickery, 42 Ibid. 132; Plummer *v.* Rundlett, Ibid. 365.

sachusetts,[1] and Connecticut,[2] where the possession of "goods, effects, or credits" of the defendant, by the garnishee, is the criterion of the garnishee's liability, real estate is not considered to come within the meaning of those terms. In New Hampshire[3] and Vermont,[4] under statutes basing the liability of the garnishee on his possession of "money, goods, chattels, rights, or credits," the same doctrine is held. Therefore, where A., when about to abscond, fraudulently executed a note to B., and a mortgage to secure the payment of the note, and B. was subsequently garnished, the court said: "The lands mortgaged are not effects within the statute, because the mortgage being fraudulent as to creditors, the lands mortgaged may be taken in execution, either by the plaintiff or by any other creditor. And it has long been settled that where lands are fraudulently conveyed by a debtor, the grantee is not thereby a trustee for creditors, because, as to them, the conveyance is void, and the lands are liable to their executions, without the assent or exposure of the grantee. If he was holden a trustee [garnishee] to the value of the lands, after having paid one creditor that value, another creditor might by his execution take the lands from him, and thus he would in effect be charged with the value without any consideration."[5] So, where an insolvent debtor had assigned personal and real property for the payment of certain debts, and the assignee was garnished, he was held not liable in respect of the real estate.[6] Aside from reasons for this rule growing out of the terms of particular statutes, there is one consideration which entitles it to general acceptance. In most of the States, if not in all, a garnishee may discharge himself from liability in respect of property of the defendant in his hands, by delivering it to the officer. Wherever this is the case, a garnishee should not be charged in respect of property which he cannot so deliver, and, therefore, not in respect of real estate. Moreover, if the conveyance to the garnishee be *bona fide*, he has no property of the defendant in his possession, and if it be fraudulent, the property is subject to the execution against the defendant, without any disclosure by the garnishee; and so, if the garnishee be made liable by one cred-

[1] How *v.* Field, 5 Mass. 390; Dickinson *v.* Strong, 4 Pick. 57; Ripley *v.* Severance, 6 Ibid. 474; Gore *v.* Clisby, 8 Ibid. 555; Bissell *v.* Strong, 9 Ibid. 562. See Seymour *v.* Kramer, 5 Iowa, 285.

[2] Risley *v.* Welles, 5 Conn. 431.

[3] Wright *v.* Bosworth, 7 New Hamp. 590.

[4] Baxter *v.* Currier, 13 Vermont, 615.

[5] How *v.* Field, 5 Mass. 390; Hunter *v.* Case, 20 Vermont, 195.

[6] Gore *v.* Clisby, 8 Pick. 555; Chapman *v.* Williams, 13 Gray, 416.

itor for the value of the land, he may afterwards lose the land by a sale under another creditor's execution.

But though a garnishee may not be charged in respect of real estate of the defendant in his possession, we shall hereafter see that he may be, on account of liabilities growing out of the possession of such property.[1]

§ 465 *a*. The whole scope of the doctrines stated in the preceding sections of this chapter would seem to indicate clearly that garnishment is a proceeding against *third persons;* that is, persons who do not stand in such relation to the defendant, as that their garnishment is, in fact, but the garnishment of the defendant. And this, doubtless, is the object of the proceeding under the custom of London; where, "if the plaintiff will surmise that *another person* within the city is a debtor to the defendant in any sum he shall have garnishment against him."[2] It is, therefore, quite inadmissible, in an action against several defendants, to summon one of them as garnishee of the others.[3] But attempts have been made to garnish individuals, where to do so was in reality to garnish the defendant; as, for instance, a toll-gate keeper of a turnpike road, and a ticket agent of a railroad; and the question has arisen, whether such a proceeding can be maintained. Upon principle, it seems that it cannot. They are not third persons, so far as their relations to the defendant are concerned; but are, in effect, the defendant. Their possession of the defendant's money is his possession. He can have no right of action against them until a demand made upon them for the money, and their failure to pay it. They occupy the same position toward him as a cashier does toward a bank, a cash clerk toward a merchant, a treasurer toward a municipal corporation; they are simply custodians of the defendant's money, under his immediate supervision and control. Still, in the case of a toll-gate keeper, it was held in Alabama, that he could be charged as garnishee of the company for which he collected tolls;[4] and in New Hampshire, that a station agent of a railroad could be so charged in respect of moneys collected by him from the sale of passenger tickets and for freight charges.[5]

[1] *Post*, § 648.

[2] *Ante*, § 1.

[3] Bailey *v.* Lacey, 27 Louisiana Annual, 39; Richardson *v.* Lacey, Ibid. 62.

[4] Central Plank-Road Co. *v.* Sammons, 27 Alabama, 380. Subsequently, in that State, it was held, that a county treasurer could not be charged as garnishee of the county; but this decision rested mainly on peculiar statutory provisions, not generally found in other States. Edmonson *v.* DeKalb County, 51 Alabama, 103.

[5] Littleton Nat. Bk. *v.* P. & O. R. R., 58 New Hamp. 104. This decision was

The same question came up in Pennsylvania, in the case of a ticket-agent of a railroad company employed at the company's office to sell tickets to passengers; and the court held, that he could not be garnished. "The purpose of an attachment," said the court, "is to reach effects of a defendant in the hands of third persons. Here, the defendant is a corporation, — a railroad company. Are its ticket-agents to be treated as third persons, so far as regards money received by them on the sale of tickets to passengers? We think not. We suppose that the case speaks of the ordinary ticket-agents employed at the offices of the company; and of these we speak. *These are the very hands of the company;* it cannot do its business without them; and if an attachment is to be regarded as arresting money received after its service, then it would always occasion the dismissal of such agents, in order to prevent such a result." [1] In like cases, like views were held in Maine.[2] In Tennessee, the treasurer of a railroad company was garnished, under a statute which declared that "all property, debts, and effects of the defendant in the possession of the garnishee or under his control, shall be liable to satisfy the plaintiff's judgment." He answered that there were moneys in the treasury of the company, when he was summoned as garnishee, but that he is but the servant of the company, under the description of treasurer; and as such he has no authority or power to control or manage the funds of the company, except under the immediate direction of said company; that the assets and effects of said company are, in fact, in the actual possession thereof, and he is the mere receiving and disbursing agent thereof. And in this sense alone, he has possession, if possession it can be called, of the funds of the company. The court held, that he had no such possession of those funds as authorized his being charged as garnishee of the company.[3] And in Kentucky, it was decided that the president of a railroad company could not be charged

rendered in March, 1877; and in the following July the New Hampshire Legislature passed an act prohibiting the garnishment of any clerk, cashier, or other employee of the defendant, on account of funds received and held by him in the ordinary course of his employment.

[1] Fowler *v.* Pittsburg, F. W. & C. R. R. Co., 35 Penn. State, 22; Muhlenberg *v.* Epler or Eiler, 2 Woodward's Decisions, 17; 1 Legal Chronicle R., 2d Ed., 227.

[2] Pettingill *v.* Androscoggin R. R. Co., 51 Maine, 370; Sprague *v.* Steam Nav. Co., 52 Ibid. 592; Bowker *v.* Hill, 60 Ibid. 172. *Sed contra*, Ballston Spa Bank *v.* Marine Bank, 18 Wisconsin, 490; Everdell *v.* Sheboygan, &c. R. R. Co., 41 Ibid. 395; First Nat. Bank *v.* Davenport & St. P. R. R. Co., 45 Iowa, 120.

[3] McGraw *v.* Memphis & O. R. R. Co., 5 Coldwell, 434. See Mueth *v.* Schardin, 4 Missouri Appeal, 403.

as garnishee of the company in respect of funds thereof in its treasury.[1]

§ 465 *b*. To the doctrine stated in the next preceding section an exception was made in Alabama under a judgment against A. individually. A. was garnished as executor of an estate, on the supposition that he had in his hands moneys due from himself as executor to himself individually; the statute of that State authorizing the garnishment of executors or administrators for a debt due by the testator or intestate to the defendant. It was held, that A. in his representative capacity might be charged as his own garnishee, but that the judgment should be satisfied out of the assets of the estate in his hands.[2] But in Iowa, in a similar case, it was ruled that such a proceeding was inadmissible.[3]

§ 465 *c*. Another exception was made in Illinois, where, while it was held that the clerk or cashier of a banking or mercantile firm could not be charged as garnishee of the firm when it was engaged in the customary and usual transaction of business, yet he might be where his employer had absconded, and the clerk was in possession of effects belonging to him; it being considered that the business relations between employer and clerk were totally suspended by the absconding.[4]

§ 466. The further consideration of this subject will naturally lead to its arrangement in two general divisions: 1. The liability of a garnishee in respect of property of the defendant in his possession; and, 2. His liability as a debtor of the defendant.

§ 467. On the first point it may be remarked, that it will often happen that a person garnished may have personal property of the defendant in his possession, and yet not be liable as garnishee. Various considerations determine the question of liability, not only as to the nature of the property, but as to the circumstances under which it is held. The property may not be such as is contemplated by the rule above declared, or by the particular statute under which the individual is garnished; or his possession of it may not be such as to make him liable; or the capacity in which he holds it may exempt him from liability;

[1] Wilder *v* Shea, 13 Bush, 128.
[2] Dudley *v*. Falkner, 49 Alabama, 148.
[3] Shepherd *v*. Bridenstine, 80 Iowa, 225.
[4] Nolte *v*. Von Gassy, 15 Bradwell, 230.

or there may be contracts in reference to it which forbid his being charged. Many such questions have arisen, eliciting acute discussion and learned adjudication. We propose, therefore, after first considering who may be subjected to garnishment, to treat of the liability of a garnishee, in respect of personal property of the defendant in his hands, under the following heads: —

I. What personal property of the defendant in the garnishee's possession will make the garnishee liable.

II. The character of the possession of personal property by a garnishee, which will be sufficient to charge him.

III. The garnishee's liability, as affected by the capacity in which he holds the defendant's property.

IV. The garnishee's liability, as affected by previous contracts touching the defendant's property in his hands.

V. The garnishee's liability, as affected by a previous assignment of the defendant's property in his hands, or by its being subject to a lien, mortgage, or pledge.

CHAPTER XIX.

WHO MAY BE GARNISHED. — CORPORATIONS. — NON-RESIDENTS.

§ 468. As a general proposition, irrespective of the ulterior question of liability, all persons are subject to garnishment. But there have arisen questions of importance connected with the character and *status* of the garnishee, which it is proper to consider, before proceeding to the more extended field of inquiry in regard to his liability. Those questions are connected: 1. With the garnishment of corporations; and, 2. With that of persons residing out of the State in which the attachment is obtained. The consideration of these points will form the subject of the present chapter.

§ 469. As to corporations, provision is usually made by statute for their garnishment. So far as such provisions are concerned, they need not be here discussed. But where such do not exist, can a corporation be summoned as garnishee, under general enactments *prima facie* applicable to natural persons only? This subject was presented before the Supreme Court of Connecticut,[1] and that of Iowa,[2] the Court of Appeals of Maryland,[3] and that of Virginia,[4] by all of which it was held — as doubtless would be held elsewhere — that, though not mentioned in the statute as the subject of garnishment, a corporation is liable thereto, in the same manner as a natural person.

§ 470. Whatever may be the statutory mode of serving an attachment on a corporation as a garnishee, a service in a mode authorized and requested by the president and directors of the corporation has been held binding on it, where those officers requested that notices of garnishment should be delivered to one of

[1] Knox *v.* Protection Ins. Co., 9 Conn. 430.

[2] Wales *v.* Muscatine, 4 Iowa, 302; Taylor *v.* Burlington & Mo. R. R. Co., 5 Ibid. 114.

[3] Boyd *v.* Chesapeake & Ohio Canal Co., 17 Maryland, 195.

[4] Baltimore & Ohio R. R. Co. *v.* Gallahue, 12 Grattan, 655.

the clerks of the corporation.[1] But care should be taken that there be in reality a service on the corporation. The notice of garnishment may be served on its officers, but not be a service on it. Thus, where such notice was served on the Mayor, Recorder, and Treasurer of a city, informing them and each of them that *they* "were attached and held as garnishees of the defendant, and as persons holding property of said defendant;" it was decided to be no service on the corporation.[2] So, where the writ of garnishment commanded the officer to "summon the said J. S., agent and attorney for the S. M. I. Co.," and it was served by copy upon J. S., it was held to be no service on the company, and a judgment rendered against the company under it was reversed.[3] So, where the law authorized the garnishment of a corporation by serving the process "on the president, cashier, secretary, treasurer, general or special agent, superintendent, or other principal officer," a return of service on "J. D. W., agent of the within named defendant," was held insufficient; the court saying: "The terms 'general or special agent' are very indefinite, but employed as they are here in association with terms designating the principal officers of the corporation, they evidently intend agents who either generally or in respect to some particular department of the corporate business have a controlling authority, either general or special."[4] So, under a statute authorizing notice of garnishment to be served on a railroad corporation "by delivering the same, or a copy thereof, to the nearest station or freight agent of such corporation in the county in which the cause of action is pending," a return by the officer on a writ of attachment, that he garnished a railroad company "by delivering a copy of the notice to S., nearest agent of the . . . Company," was held to be no garnishment, because it did not appear that the agent upon whom the notice was served was either a station or freight agent.[5] And, under the same statute, a return of service "by delivering a true copy of it to W. B., the resident station agent . . . at the business office of said company," was held to give the court no juris-

[1] Davidson *v.* Donovan, 4 Cranch C. C. 578. However correct this view might be so far as the garnishee is concerned, it could not be relied on to give priority of right over subsequent garnishments, regularly served, where the fund in the garnishee's hands was insufficient to satisfy all the attachments.

[2] Claflin *v.* Iowa City, 12 Iowa, 284; Greer *v.* Rowley, 1 Pittsburgh, 1.

[3] Sun Mutual Ins. Co. *v.* Seeligson, 59 Texas, 3.

[4] Lake Shore & M. S. R. Co. *v.* Hunt, 39 Michigan, 469. See State F. & M. I. Co. *v.* The Oglesby, 1 Pearson, 152.

[5] Haley *v.* H. & St. J. R. Co., 80 Missouri, 112.

diction of the company as garnishee, because it did not show that the agent on whom service was had was "the nearest station or freight agent of the corporation in the county."[1] So, where the summons of garnishment was served on the agent of a foreign corporation, and required him to answer what *he* owed the defendant.[2] So, where notice of garnishment was served on A. and B., as agents of a foreign insurance company, it was considered insufficient to authorize judgment against the company.[3] And where the statute authorizes garnishment by leaving a copy of the writ with the person owing debts to, or having property of, the defendant in his possession, "or with his agent;" it was held, that the agent must be a *managing* agent; and therefore that service upon the *teller* of a bank, whose sole duty was to receive and pay out moneys that came into and went out of the bank, was not a garnishment of the bank.[4] And where the law required service on a garnishee to be personal, but did not prescribe the mode of garnishment of a corporation, it was held, that service upon an agent of the corporation was not sufficient, but that it should have been made, as at common law, upon the president, or other officer fulfilling the duties of president;[5] and the temporary absence of the president will not warrant service on a subordinate officer or agent; and no judgment can be taken against the corporation for failing to answer, where the return shows that the president was not served.[6] In Connecticut, it was decided that a corporation could not be charged as garnishee, where no legal service of process had been made upon it, though its secretary appeared and answered, and made no objection to the sufficiency of the service;[7] and in Maryland, that an admission of service by the attorney of a corporation could not give the court jurisdiction of the corporation as garnishee.[8]

§ 470 *a*. Where the law authorizes service of process on any one of several named officers of a corporation, and a notice of garnishment is served on one of them who has not in his actual possession the property sought to be reached by the process, but such property is in the possession of some other officer or employee

[1] Werries *v.* M. P. R. Co., 19 Missouri Appeal, 398; Masterson *v.* M. P. R. Co., 20 Ibid. 653.

[2] Varnell *v.* Speer, 55 Georgia, 132.

[3] Daniels *v.* Meinhard, 53 Georgia, 359.

[4] Kennedy *v.* H. L. & S. Society, 38 California, 151.

[5] Clark *v.* Chapman, 45 Georgia, 486; Lambreth *v.* Clarke, 10 Heiskell, 32.

[6] Steiner *v.* Central Railroad, 60 Georgia, 552.

[7] Raymond *v.* Rockland Co., 40 Conn. 401.

[8] Northern C. R. Co. *v.* Rider, 45 Maryland, 24.

of the company, who, ignorant of the garnishment, delivers it to a person authorized to receive it, before he can, with reasonable diligence on the part of the officer served, be notified to retain the possession thereof, the company cannot be charged as garnishee in respect of such property. Nor is the officer served under obligation to use extraordinary diligence in notifying the officer or employee in charge of the property of the service of the process.[1]

§ 471. The rules governing the liability of a corporation as a garnishee, do not differ from those applicable to the case of an individual. The corporation must either have personal property of the defendant in its possession, capable of being seized and sold under execution, or be indebted to him. Neither of these conditions is fulfilled by the mere fact of the defendant being a stockholder in the corporation; and the corporation cannot be charged as his garnishee on that account.[2] Nor can a corporation be charged as garnishee in respect of certificates of membership in it, held by an attachment defendant.[3]

§ 472. Different views are entertained as to the manner in which a corporation shall answer as garnishee. In Virginia and South Carolina, it must answer through its chief officer and under its common seal.[4] In Alabama, the same rule exists, with the further requirement, that, if the seal be used by another than the chief officer, it should appear to have been by the express authority of the directors. It was therefore held, that an answer of a corporation put in by its cashier, or the individual answer under oath of either a president or cashier, is not sufficient.[5]

In Illinois, on the contrary, where the statute required an answer to be sworn to in all cases, an answer of a corporation, signed by its secretary and under its corporate seal, was held sufficient; and as the corporation could not swear, the oath of a proper officer, or of an agent of the company, was considered a substantial compliance with the statute.[6]

[1] Bates *v.* C., M., & St. P. R'y Co., 60 Wisconsin, 296.

[2] Planters & Merchants' Bank *v.* Leavens, 4 Alabama, 753; Ross *v.* Ross, 25 Georgia, 297; Mocar *v.* Walker, 46 Iowa, 164. *Sed contra*, Chesapeake & O. R. R. Co. *v.* Paine, 29 Grattan, 502.

[3] Netter *v.* Chicago Board of Trade, 12 Bradwell, 607.

[4] Callahan *v.* Hallowell, 2 Bay, 8; Baltimore & O. R. R. Co. *v.* Gallahue, 12 Grattan, 655.

[5] Branch Bank *v.* Poe, 1 Alabama, 396; Planters and Merchants' Bank *v.* Leavens, 4 Ibid. 753.

[6] Oliver *v.* C. & A. R. R. Co., 17 Illinois, 587; Chicago, R. I. & P. R. Co. *v.* Mason, 11 Bradwell, 525.

In Maine, the answer can only be made by an agent or attorney of the corporation. It need not be a general agent, but one specially authorized may act in that capacity, whether he be a member of the corporation or not.[1]

§ 474. Concerning the residence of a person, as affecting his liability to garnishment, there is no doubt that a resident may be summoned and charged as garnishee in respect of a debt he owes to a non-resident.[2] But an essentially different question arises when a non-resident, casually found within the jurisdiction of a court, is garnished under its process.

Under the custom of London one cannot be charged as garnishee, unless he resides within the jurisdiction of the Lord Mayor's court.[3] In this country, the question has been repeatedly presented, and the uniform tenor of the adjudications is that whether the defendant reside or not in the State in which the attachment is obtained, a non-resident cannot be subjected to garnishment there, unless, when garnished, he have in that State property of the defendant in his hands, or be bound to pay the defendant money, or to deliver to him goods, at some particular place in that State.

As in many other questions in the law of attachment, Massachusetts was the first to pass upon this point, in a case where both defendant and garnishee were non-residents. The Supreme Court there said: "The summoning of a trustee is like a process *in rem.* A *chose in action* is thereby arrested and made to answer the debt of the principal. The person entitled by the contract of the supposed trustee is thus summoned by the arrest of this species of effects. These are, however, to be considered for this purpose as local, and as remaining at the residence of the debtor or person intrusted for the principal, and his rights in this respect are not to be considered as following the debtor to any place where he may be transiently found, to be there taken at the will of a third person, within a jurisdiction where neither the original creditor nor debtor resides."[4]

When the point arose again, the defendant was a resident, and the garnishee a non-resident, and the court maintained its pre-

[1] Head *v.* Merrill, 34 Maine, 586.

[2] Berry *v.* Nelson, 77 Texas, 191; Nichols *v.* Hooper, 61 Vermont, 295.

[3] 1 Saunders, 67, Note *a*; Tamm *v.* Williams, 2 Chitty, 438; 3 Douglass, 281; Crosby *v.* Hetherington, 4 Manning & Granger, 933; Day *v.* Paupierre, 7 Dowling & Lowndes, 12; 13 Adolphus & Ellis, N. S. 802.

[4] Tingley *v.* Bateman, 10 Mass. 343; Nye *v.* Liscomb, 21 Pick. 263. See Wheat *v.* P. C. & F. D. R. R., 4 Kansas, 370.

vious position.[1] The same ground has been taken in Maine, New Hampshire, Vermont, Rhode Island, Connecticut, New York, Mississippi, Missouri, and the District of Columbia.[2]

§ 475. This doctrine, however, as previously intimated, does not apply, where the garnishee has in his hands, in the State in which he is summoned, property of the defendant, or has contracted to pay money or deliver goods to the defendant at some particular place in that State. In regard to this condition of things, the Superior Court of New Hampshire said: "The property was attached in the trustee's hands, while in his possession in this State. If he had not the property with him, but had left it at his residence, it could not be said that it was attached here; but having it with him, we see no reason why it might not be attached in this way, as well as if it had been visible personal property of the defendant's and taken by the officer. If the trustee had brought into this State the goods and chattels of the defendant, and had himself no special property in them which might give him the power to remove them from the State, they could, no doubt, have been attached and held on a writ against the defendant; and it appears to us that no well-founded distinction can be pointed out between such a case and one where the trustee has about his person, at the time the writ is served upon him, the money and notes of the defendant."[3]

§ 476. When one is summoned as garnishee in a State of which he is not a resident, the service of process on him raises a presumption that he is a resident there,[4] and it is therefore necessary, for his own protection, that he should answer to the proceeding and avail himself of whatever defence he has against liability; or he will be liable to a judgment by default against him, if the law under which he was summoned authorize that course of proceeding; for, by the service of the process, the court

[1] Ray *v.* Underwood, 3 Pick. 302; Hart *v.* Anthony, 15 Ibid. 445.

[2] *Ante*, § 452 *a*; Lovejoy *v.* Albree, 33 Maine, 414; Jones *v.* Winchester, 6 New Hamp. 497; Lawrence *v.* Smith, 45 Ibid. 533; Sawyer *v.* Thompson, 4 Foster, 510; Baxter *v.* Vincent, 6 Vermont, 614; Towle *v.* Wilder, 57 Ibid. 622; Cronin *v.* Foster, 13 Rhode Island, 196; Green *v.* Farmers & Citizens' Bank, 25 Conn. 452; Bates *v.* New Orleans, &c. R. R. Co., 4 Abbott Pract. 72; Willet *v.* Equitable Ins. Co., 10 Ibid. 193; Bush *v.* Nance, 61 Mississippi, 237; Green's Bank *v.* Wickham, 23 Missouri Appeal, 663; Keating *v.* A. R. Co., 32 Ibid. 298; Todd *v.* Missouri P. R. Co., 33 Ibid. 110; Wright *v.* C. B. & Q. R. R. Co. 19 Nebraska, 175; Miller *v.* Hooe, 2 Cranch, C. C. 622. *Sed contra*, Morgan *v.* Neville, 74 Penn. State, 52.

[3] Young *v.* Ross, 11 Foster, 201.

[4] Glass *v.* Doane, 15 Bradwell, 66.

acquires jurisdiction of his person, and the question whether it has, or can take, jurisdiction of the effects in his hands, can only be raised by himself upon his answer.[1]

§ 477. The exemption from garnishment on account of non-residence is not to be pushed beyond the reason of the rule, which rests upon the ground that the property or debt sought to be reached is without the jurisdiction of the court, and, for that reason, incapable of being subjected to its process. Therefore, if several joint debtors be garnished, part of whom are residents and part non-residents, the jurisdiction will extend to all, in virtue of the residence of those within the State. This was decided in Vermont, under a statute which provided "that no person shall be summoned as trustee, unless at the time of the service of the writ he resides in this State." Four persons, members of a firm existing in the State, were summoned as garnishees, two of whom were residents of the State of New York. It was claimed that none of them were chargeable, because the two non-residents being specially excepted from the act, all the members of the firm were likewise excepted, as none were liable to be prosecuted on the joint claim unless all were, or could be made, legal parties to the record. But the court held, that the statute applied only to cases where all the garnishees resided in another State, and not to a case where some of them were residents of Vermont, where the partnership was formed and had its place of business; and that, if the effects in their hands are considered local, and as remaining at the residence of the garnishee, they must be regarded as remaining where the partnership was formed, its business transacted, and two of its members resided.[2]

§ 478. The principles which would exempt non-residents from garnishment produce the same result in the case of a foreign corporation. This was so determined in Massachusetts, though the officers of the corporation resided, and its books and records were kept, in that State, and though the statute there declares that "all corporations may be summoned as trustees." The very generality of the terms was considered to require some qualification. "It cannot," said the court, "be construed literally, all corporations, in whatever part of the world established and

[1] Lawrence v. Smith, 45 New Hamp. 533; Thornton v. American W. M. Co., 83 Georgia, 288.

[2] Peck v. Barnum, 24 Vermont, 75.

transacting business. The answer is to be found in the statutes *in pari materia* then existing. The statute in question was only an extension of an existing system; it was intended, we think, to put corporations on the same ground as individuals. And it is well settled that an individual, an inhabitant of another State, is not chargeable by the trustee process, although found in this commonwealth, and here served with process. In the case of corporations which have no local habitation, the principle is this: if established in this commonwealth, by the laws thereof, they are inhabitants of this commonwealth, within the meaning of the law; but if established only by the laws of another State, they are foreign corporations, and cannot be charged by the trustee process."[1] The same views obtain in New Hampshire.[2] And in Maryland, where the statute authorized suits by non-residents against foreign corporations exercising franchises there, "when the cause of action has arisen, or the subject of the action shall be situated in this State," it was held, that a British insurance company, doing business there through an agent, could not be charged as garnishee on account of a loss under a policy issued to non-residents, by an agent in Chicago, Illinois, upon property in that city; because the holders of the policy could not sue the company thereon in Maryland.[3] And in New York, where an agent upon whom the process is served is a non-resident, and when served, is only casually in the State, no attachment of the debt is effected.[4] And in Alabama it is held, that a debt due from a Kentucky railroad company to one of its employees in Kentucky, could not be reached by the garnishment of the company in an Alabama court.[5] And so in Georgia, as to a railroad company chartered by the States of Tennessee, Virginia, and Georgia, where it was sought to attach in Georgia wages due to a day laborer employed in Tennessee.[6] And so in Michigan, as to a railroad company chartered in Indiana, when it was attempted to garnish it in Michigan for wages due to an employee in Indiana, in favor of the assignee of a creditor of the employee; to whom the claim had been assigned for the purpose of its prosecution in Michigan, in order to evade the statute of Indiana which exempted

[1] Danforth *v.* Penny, 3 Metcalf, 564; Gold *v.* Housatonic Railroad Co., 1 Gray, 424; Bradford *v.* Mills, 5 Rhode Island, 393; Larkin *v.* Wilson, 106 Mass. 120.

[2] Smith *v.* B. C. & M. Railroad, 33 New Hamp. 337.

[3] Myer *v.* Liverpool L. & G. Ins. Co., 40 Maryland, 595.

[4] Willet *v.* Equitable Ins. Co., 10 Abbott Pract. 193. See Midland P. R. R. Co. *v.* McDermid, 91 Illinois, 170.

[5] Louisville & N. R. R. Co. *v.* Dooley, 78 Alabama, 524.

[6] Wells *v.* East Tenn. V. & G. R., 74 Georgia, 548.

wages in such a case from attachment.[1] And so in Missouri, as to a railroad company chartered in Illinois, which was garnished in respect of money due as salary to an employee in Illinois; the plaintiff in the attachment being also a resident of that State.[2] And in Missouri a railroad company chartered in that State, having a line in Texas, was held not to be chargeable as garnishee in a Missouri court on account of wages due to an employee in Texas and payable there.[3] In New York an insurance company created and existing under the laws of the kingdom of Great Britain, and having an agent in New York for the transaction of its business, became indebted, on account of a loss by fire, to a corporation in Chicago, where the negotiations for the policy took place, and where it was delivered; and it was attempted to attach in New York the debt of the British company to the Illinois company; but it was held that it could not be there seized under the attachment.[4]

But in Pennsylvania, a foreign railroad corporation was held as garnishee, where it had accepted from that State the privilege of extending its road through one of the counties thereof, coupled with a provision in the act granting the privilege, which required the company "to keep at least one manager, toll-gatherer, or other officer, a resident in the county;" on whom service of process "in all suits or actions which may be brought against said company," was declared to be "as good and available in court as if made on the president thereof."[5] And in Ohio a foreign railroad company was subjected to garnishment, where it was operating a railroad in that State with the assent of the legislature; and for all purposes of proceedings in attachment and garnishment was held to be a domestic corporation.[6] And in Missouri, under a statute which provided that "notice of garnishment shall be served on a corporation in writing, by delivering such notice, or a copy thereof, to the president, secretary, treasurer, cashier, or other chief or managing officer of such corporation," it was held, that a foreign insurance company, having an agency in that State, might be garnished, by serving the notice upon the agent; who, for that purpose, would be regarded

[1] Drake *v.* Lake Shore & M. S. R. Co., 69 Michigan, 168.

[2] Fielder *v.* Jessup, 24 Missouri Appeal, 91.

[3] Todd *v.* Missouri P. R. Co., 33 Missouri Appeal, 110.

[4] Straus *v.* Chicago G. Co., 53 New York Supreme Ct. 216.

[5] Jones *v.* New York & Erie R. R. Co., 1 Grant, 457; Fithian *v.* New York & Erie R. R. Co., 31 Penn. State, 114; Barr *v.* King, 96 Ibid. 485.

[6] Railroad *v.* Peoples, 31 Ohio State, 537.

as a "managing officer," within the meaning of the statute.[1] And in Kansas, where the statute required every railroad company doing business in that State, or having agents doing business therein for it, to designate some person residing in each county into which its railroad line runs, on whom all process and notices issued by any court of record or justice of the peace of such county might be served; it was held, that a Nebraska railroad company which leased a line of railroad in Kansas, and operated the same, and kept local agents there, was liable to garnishment there for a debt due from it to a contractor, which was payable at its principal office in Nebraska.[2] And in Wisconsin, under a statute providing that "a corporation may be summoned as garnishee by service of notice to appear and answer, upon the president, cashier, treasurer, secretary, or other agent or officer of the corporation upon whom a summons may by law be served in cases where an action is commenced against such corporation," it was held, that a foreign corporation was liable to garnishment by service of notice upon its agent.[3] And in Illinois, where the statute declared that "foreign corporations, and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed on corporations of like character organized under the general laws of this State," it was held, that a Missouri corporation, having an agent in Illinois, could be summoned in the latter State, as garnishee of a citizen of Missouri, by service of the garnishment process on the agent; there being also a statute which authorized a domestic corporation to be "served with process by leaving a copy thereof," in the absence of the president, "with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any agent of said company found in the county."[4] And in that State, a foreign insurance company, having an agency in that State, was charged as garnishee there, on account of a loss in Wisconsin; the court holding that a corporation, under whatsoever law incorporated, is a resident, for all purposes of suit, wherever by authority of the local law it exercises its corporate powers and functions.[5]

[1] McAllister *v.* Penn. Ins. Co., 28 Missouri, 214.

[2] Burlington & M. R. R. Co. *v.* Thompson, 31 Kansas, 180.

[3] Brauser *v.* New England F. I. Co., 21 Wisconsin, 506. See Selma R. & D. R. R. Co. *v.* Tyson, 48 Georgia, 351.

[4] Hannibal & St. J. R. R. Co. *v.* Crane, 102 Illinois, 249. See Mooney *v.* U. P. R Co., 53 Iowa, 346.

[5] Roche *v.* R. I. Ins. Ass'n, 2 Bradwell, 360.

§ 478 *a*. A corporation chartered in one State cannot go into or carry on its business in another State without the permission of the latter; and when it receives and avails itself of such permission, it is subject to all the laws of that State, however they may differ from those of the State by which it was created. Hence, if the laws of the State from which it receives the permission authorize the garnishment of a foreign corporation, it is no defence against the proceeding that those of its own State expressly exempt the funds in its hands from attachment.[1]

§ 479. Where, as is sometimes the case, a corporation is chartered by two or more States, it is not in any of those States a foreign corporation, and may be subjected to garnishment in any of them, though its office and place of business be not in the State in which the garnishment takes place.[2]

[1] First Nat. Bank *v.* Burch, 80 Michigan, 242.

[2] Baltimore & Ohio R. R. Co. *v.* Gallahue, 12 Grattan, 655; Smith *v.* B. C. & M. Railroad, 33 New Hamp. 337. See Sprague *v.* Hartford, P. & F. R. R. Co., 5 Rhode Island, 233; Mahany *v.* Kephart, 15 West Virginia, 609; Holland *v.* Railroad Co., 16 Lea, 414.

CHAPTER XX.

WHAT PERSONAL PROPERTY IN THE GARNISHEE'S HANDS WILL MAKE HIM LIABLE.

§ 480. THE rule that the personal property in the garnishee's hands in respect of which he may be charged, must be such as is capable of being seized and sold on execution,[1] results from the consideration that he should be at liberty, if he wish, to discharge himself from pecuniary liability, by delivering the property into the custody of the tribunal before which he is summoned; and therefore, that he should not be charged for that which, if so delivered, could not be sold under execution. Therefore, where a garnishee admitted that, when summoned, he had in his possession a horse of the defendant's, but showed that the horse was by law exempt from execution against the defendant, he was held not chargeable.[2] This rule applies to the proceeds, in money, of exempted real estate sold under execution, under a statute authorizing such to be awarded to a debtor in lieu of the property;[3] and also to money recovered by a debtor for the value of property exempt from execution which had been seized and sold.[4] But if the owner of property so exempt sell the same, the debt due him therefor may be attached.[5] And if property exempt from execution be destroyed by fire while insured, the insurance company may be charged as garnishee of the owner for the amount due under the policy.[6] And if money which before its payment to the defendant could not be reached by garnishment, by reason of its being exempted from attachment, be,

[1] *Ante*, § 463.

[2] Davenport *v.* Swan, 9 Humphreys, 186; Staniels *v.* Raymond, 4 Cushing, 314; Fanning *v.* First Nat. Bank, 76 Illinois, 53. Where one held a certificate of shares of stock in a bank in another State, in favor of the defendant, it was held, that he could not be charged as garnishee in respect thereof; because the court could not subject either the certificate or the stock to its execution. Christmas *v.* Biddle, 13 Penn. State, 223. See Deacon *v.* Oliver, 14 Howard Sup. Ct. 610; Moore *v.* Gennett, 2 Tennessee Ch'y, 375.

[3] Gery *v.* Ehrgood, 31 Penn. State, 329; Hastie *v.* Kelley, 57 Vermont, 293.

[4] Stebbins *v.* Peeler, 29 Vermont, 289.

[5] Scott *v.* Brigham, 27 Vermont, 561; Knabb *v.* Drake, 23 Penn. State, 489.

[6] Wooster *v.* Page, 54 New Hamp. 125.

after its payment, lent out by him, the borrower may be subjected to liability on account of it, as garnishee of the defendant. This was held, in reference to a soldier's bounty voted by a town; which, before its payment to the soldier, could not be attached by the garnishment of the town;[1] but after its payment, could be reached by the garnishment of a person to whom it was lent.[2]

The garnishee, in such cases, may object to such property being held by the attachment, though the defendant do not raise the question;[3] for if the former know of the exemption, and fail to bring it to the notice of the court, and thereby be charged as garnishee, the judgment will be no protection to him.[4] And he, or the defendant, may show to the court the fact of the exemption, at any stage of the case before the money is actually paid over to the attachment plaintiff.[5]

§ 480 *a*. In some States laws exist exempting from attachment a certain amount of money due to a head of a family. In such case it is the duty of a defendant to furnish the garnishee with the information and means to prove the fact of exemption, or himself to prove it; and it is the right and duty of the defendant, if judgment is erroneously given against the garnishee, to have it set aside, or to appeal from it; and if he fail in these several respects, he is bound by the judgment against the garnishee, and cannot impeach it collaterally.[6]

§ 480 *b*. As a general proposition, such exemption laws have no force out of the State which enacts them. Therefore, one summoned as garnishee of a non-resident cannot avoid liability by merely showing that, by the law of the defendant's residence, his debt to the defendant is exempt from attachment.[7] But

[1] Brown *v.* Heath, 45 New Hamp. 168.

[2] Manchester *v.* Burns, 45 New Hamp. 482.

[3] Clark *v.* Averill, 31 Vermont, 512; Winterfield *v.* Milwaukee & St. P. R. R. Co., 29 Wisconsin, 589; Mull *v.* Jones, 33 Kansas, 112. But see Osborne *v.* Schutt, 67 Missouri, 712; Conley *v.* Chilcote, 26 Ohio State, 320; Chilcote *v.* Conley, 36 Ibid. 545.

[4] *Post*, § 714; Lock *v.* Johnson, 36 Maine, 464; Daniels *v.* Marr, 75 Ibid. 397; Pierce *v.* Chicago & N. R. Co., 36 Wisconsin, 283; Chicago & A. R. R. Co. *v.* Ragland, 84 Illinois, 375; Chicago, R. I., & P. R. R. Co. *v.* Mason, 11 Bradwell, 525; Walker *v.* Hinze, 16 Ibid. 326; Missouri P. R. Co., *v.* Whipsker, 77 Texas, 14; Parker *v.* Wilson, 61 Vermont, 116; Terre Haute & I. R. Co. *v.* Baker, 122 Indiana, 433.

[5] Union P. R. Co. *v.* Smersh, 22 Nebraska, 751.

[6] Wigwall *v.* Union C. & M. Co., 37 Iowa, 129. See Randolph *v.* Little, 62 Alabama, 396.

[7] Morgan *v.* Neville, 74 Penn. State, 52; Mineral Point R. R. Co. *v.* Barron, 83 Illinois, 365; Moore *v.* C., R. I., & P. R. Co., 43 Iowa, 385; Burlington &

where the debt is for services rendered in a State which exempts such a debt from attachment, and is payable there; and a creditor of the party to whom it is due assigns his claim to a person in another State, in order to enable the assignee there to garnish a debtor of the non-resident debtor, and in that proceeding no service of process is had upon such non-resident debtor; the court will not allow its process to be used for such purpose, and to that extent will take cognizance of the exemption law of the State in which the debt was contracted.[1] And where by the laws of the State of an employee's residence, wages due him are exempt from attachment, if a creditor residing in the same State attempts to attach the wages by garnishment proceedings in another State, injunction will lie in the employee's State to restrain such proceeding.[2] And if the creditor, not having been enjoined, succeed in obtaining judgment against the employer as garnishee, and collect the money thereon, the employee can recover back from the creditor the amount so collected.[3] And where, by the laws of the State of an employee's residence, wages due him for labor performed in that State are exempt from attachment, it is no defence to an action brought there by him for the wages, that, before such action was brought, the debtor had been garnished in respect thereof in another State, and there ordered to pay into court the amount of the debt. In such case, in the absence of any showing to the contrary, it will be presumed that the exemption laws of the State in which the garnishment occurred are the same as in the State of the employee's residence.[4]

§ 480 *c*. When one is summoned as garnishee of a non-resident defendant, if his debt to the defendant is, by the *lex fori*, exempt from attachment, the defendant is as much entitled to the benefit of the exemption as he would be if he were a resident.[5]

M. R. R. Co. *v.* Thompson, 31 Kansas, 180; Stevens *v.* Brown, 20 West Virginia, 450; Carson *v.* Railway Co., 88 Tennessee, 646.

[1] Drake *v.* L. S. & M. S. R. Co., 69 Michigan, 168.

[2] Snook *v.* Snetzer, 25 Ohio State, 516; Zimmerman *v.* Franke, 34 Kansas, 650.

[3] Stark *v.* Bare, 39 Kansas, 100; Albrecht *v.* Treitschke, 17 Nebraska, 205; Haswell *v.* Parsons, 15 California, 266.

[4] Missouri P. R. Co. *v.* Sharitt, 43 Kansas, 375; Pierce *v.* Chicago & N. W. R. Co., 36 Wisconsin, 283.

[5] Missouri P. R. Co. *v.* Maltby, 34 Kansas, 125; Kansas City, St. J., & C. B. R. Co. *v.* Gough, 35 Ibid. 1; Mineral Point R. R. Co. *v.* Barron, 83 Illinois, 368; Lowe *v.* Stringham, 14 Wisconsin, 222; Hill *v.* Loomis, 6 New Hamp. 263; Sproul *v.* McCoy, 26 Ohio State, 577; Haskill *v.* Andros, 4 Vermont, 609; Wright *v.* C. B. & Q. R. R. Co., 19 Nebraska, 175.

§ 481. It has been uniformly held, that, unless authorized by statute, one having in his possession promissory notes, or other *choses in action*, belonging to the defendant, cannot, in respect thereof, be charged as garnishee.[1] Among the many cases governed by this rule the following will serve for illustration. Where it appeared from the garnishee's answer that he had become security for the defendant, who, to indemnify him, had placed in his hands certain notes of third persons, the property of the defendant, it was held, that the notes not being capable of being seized and sold on execution, the garnishee was not liable; and that it made no difference whether the proceeds of the notes were necessary or not for the indemnification of the garnishee.[2] So, where the garnishee disclosed that he held certain notes or bills of the Hillsborough Bank, which had been presented for payment and refused, and which belonged to the defendant, it was decided that as such bills or notes were mere *choses in action*, the garnishee could not be charged in respect thereof.[3] But where a

[1] Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; Perry *v.* Coates, 9 Ibid. 537; Dickinson *v.* Strong, 4 Pick. 57; Andrews *v.* Ludlow, 5 Ibid. 28; Lupton *v.* Cutter, 8 Ibid. 298; Gore *v* Clisby, Ibid. 555; Guild *v.* Holbrook, 11 Ibid. 101; Hopkins *v.* Ray, 1 Metcalf, 79; Meacham *v.* McCorbitt, 2 Ibid. 352; New Hamp. I. F. Co. *v.* Platt, 5 New Hamp. 193; Stone *v.* Dean, Ibid. 502; Fletcher *v.* Fletcher, 7 Ibid. 452; Howland *v.* Spencer, 14 Ibid. 530; Hitchcock *v.* Egerton, 8 Vermont, 202; Van Amee *v.* Jackson, 35 Ibid. 173; Fuller *v.* Jewett, 37 Ibid. 473; Rundlet *v.* Jordan, 3 Maine, 47; Copeland *v.* Weld, 8 Ibid. 411; Clark *v.* Viles, 32 Ibid. 32; Wilson *v.* Wood, 34 Ibid. 123; Smith *v.* Kennebec & Portland R. R. Co., 45 Ibid. 547; Skowhegan Bank, *v.* Farrar, 46 Ibid. 293; Bowker *v.* Hill, 60 Ibid. 172; Fitch *v.* Waite, 5 Conn. 117; Grosvenor *v.* Farmers & Mechanics' Bank, 13 Ibid.104; Tweedy *v* Bogart, 56 Ibid. 419; Jones *v.* Norris, 2 Alabama, 526; Marston *v.* Carr, 16 Ibid. 325; Pearce *v.* Shorter, 50 Ibid. 318; Moore *v.* Pillow, 3 Humphreys, 448; Raiguel *v.* McConnell, 25 Penn. State, 362; Allen *v.* Erie City Bank, 57 Ibid. 129; Wilson *v.* Albright, 2 G. Greene, 125; Deacon *v.* Oliver, 14 Howard Sup. Ct. 610; Price *v.* Brady, 21 Texas, 614; Taylor *v.* Gillian, 23 Ibid. 508; Tirrell *v.* Canada, 25 Ibid. 455; Ellison *v.* Tuttle, 26 Ibid. 283.

[2] Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; Dickinson *v.* Strong, 4 Pick. 57.

[3] Perry *v.* Coates, 9 Mass. 537. In Massachusetts this case occurred. The Suffolk Bank was summoned as garnishee of the Nahant Bank, at a time when, under an arrangement between the two, the former had in its possession a large amount of the notes of the latter issued as a circulating medium, and which the statute of that State authorized to be attached. It appeared that the Suffolk Bank was accustomed to take up the bills of the Nahant Bank in the common course of business, to charge the amount to the latter, and from time to time to return the bills thus charged to the Nahant Bank; and that to meet the amounts so charged, the Nahant Bank was accustomed to place funds with the Suffolk Bank, which went to balance the account. The question was, whether the Suffolk Bank could be charged as garnishee in respect of its possession of the bills of the Nahant Bank. The court held, that the Suffolk Bank must be considered, either as the agent of the Nahant

garnishee had received for the defendant bank-bills which were *current as money* he was charged.[1] Where it appeared that the garnishee had received from the defendant the evidence of a contract made by a third person, engaging to deliver to the defendant three hundred barrels of beef, such contract was held to be a mere *chose in action*, and not attachable in the garnishee's hands.[2] So, where persons to whom the defendant had made an assignment, for the benefit of creditors, of goods and merchandise, book debts, promissory notes, and other *choses in action*, were garnished, under such circumstances that, if they had had goods or money in their possession they would have been liable, it was held that, having only *choses in action*, they could not be charged.[3] So, where an assignee for the benefit of creditors had sold the assigned effects on credit, and taken notes from the purchasers, and before the maturity of the notes he was garnished, it was decided that he could not be charged.[4] So, an attorney who has in his care a debt in the course of collection, belonging to a defendant in attachment, cannot be holden as garnishee on that account.[5] So, a note deposited in one's hands and not collected, will not subject him as garnishee, even though a judgment has been recovered on it in his name.[6] So, where one had received a check, with authority to draw the amount, and pay it to the defendant on certain conditions, which had been complied with; but it did not appear that he had received the money; it was decided that he could not be charged on account of the check.[7]

§ 481 *a*. Where a statute authorized a garnishee to be charged on account of "goods, chattels, *choses in action*, credits, and effects of the defendant, and the value thereof in his possession, custody, or charge, or from him due and owing to the defend-

Bank, taking up the bills of the latter for its account out of funds provided for it, or advanced by the Suffolk Bank for that purpose, — in which case, the notes, when so taken up, were no longer bills issued and circulated as money, and therefore not attachable, — or as holders of the bills on their own account, for value, and entitled to hold them as vouchers to support the charges in their account, and thus cancel and discharge the credits given by them to the Nahant Bank; and that in either view the Suffolk Bank was not chargeable. Wildes *v.* Nahant Bank, 20 Pick. 352.

[1] Morrill *v.* Brown, 15 Pick. 173; Lovejoy *v.* Lee, 35 Vermont, 430.

[2] Andrews *v.* Ludlow, 5 Pick. 28.

[3] Lupton *v.* Cutter, 8 Pick. 298; Gore *v.* Clisby, Ibid. 555; Copeland *v.* Weld, 8 Maine, 411.

[4] Hopkins *v.* Ray, 1 Metcalf, 79.

[5] Hitchcock *v.* Egerton, 8 Vermont, 202; Fitch *v.* Waite, 5 Conn. 117; Mayes *v.* Phillips, 60 Mississippi, 547.

[6] Rundlet *v.* Jordan, 3 Maine, 47.

[7] Lane *v.* Felt, 7 Gray, 491. See Hancock *v.* Colyer, 99 Mass. 187; Knight *v.* Bowley, 117 Ibid. 551.

ant," it was held that the phrase *choses in action* referred only to those in the possession, custody, or charge of the garnishee belonging to the defendant and held against third parties; and could not be construed to include a liability of the garnishee to the defendant for unliquidated damages.[1]

[1] Burgess *v.* Capes, 32 Illinois Appellate, 372.

CHAPTER XXI.

WHAT POSSESSION OF PERSONAL PROPERTY BY A GARNISHEE WILL MAKE HIM LIABLE.

§ 482. I. *Actual and constructive possession.* When a garnishee is summoned, the effect of the proceeding is to attach any personal property of the defendant in his possession, capable of being seized and sold under execution. And it is a general rule that the property must be in the actual possession of the garnishee, or within his control, so that he may be able to turn it out on execution.[1] But though not in his actual possession, if he have the right to, and the power to take, immediate possession, he must be regarded as being in possession.[2]

The proposition, however, that a garnishee is liable for personal property of the defendant in his possession, applies only to cases where he knows that, when garnished, he had such property in his hands. If he then had property in his possession, received from a third person, which was in fact the defendant's, but not known to him to be so, and he parted with it before he became aware of that fact, he cannot be charged in respect thereof.[3]

§ 483. Constructive possession of the defendant's property will not suffice to make the garnishee liable.[4] Thus, where the garnishee had left in the hands of merchants in a foreign port goods of the defendant, which had been under his charge as master of a schooner, it was held, that he was not liable on account of the goods, the same not being in his possession when he was garnished, though he held the receipt of the foreign merchants therefor.[5] So, where goods were consigned by merchants

[1] Andrews v. Ludlow, 5 Pick. 28; Burrell v. Letson, 1 Strobhart, 239.

[2] Lane v. Nowell, 15 Maine, 86; Morse v. Holt, 22 Ibid. 180. See Peabody v. Maguire, 79 Maine, 572.

[3] Bingham v. Lamping, 26 Penn. State, 340.

[4] Smalley v. Miller, 71 Iowa, 90.

[5] Willard v. Sheafe, 4 Mass. 235. This case does not, in itself, appear to have been decided on this ground, but in Andrews v. Ludlow, 5 Pick. 28, it is so stated by WILDE, J.

in Philadelphia to merchants in Boston, and after the latter received the bill of lading, but before the goods arrived, they were garnished, it was decided that they were not liable, not having the goods in possession when summoned.[1] So, where the garnishees stated that a part of the property transferred by the defendant to them consisted of parts of certain ships, with their cargoes, then at sea, they were held not chargeable, because they had not actual, but only constructive, possession of the property.[2]

§ 484. But, where the agent of a garnishee had collected money for the garnishee, in respect of which the latter would have been liable, had he himself received it, he was charged, though at the time of the garnishment the money had not been paid over to him by the agent.[3]

§ 485. II. *Possession considered with reference to privity of contract and of interest between the garnishee and the defendant.* The garnishee must not only have actual possession of the defendant's effects, but there must be, except in cases of fraudulent dispositions of property, privity between him and the defendant, both of contract, express or implied, and of interest, by which the defendant would have a right of action against the garnishee, to recover the property for his own use, either at the present or some future time.[4] The want of privity, either of contract or of interest, will generally prevent the garnishee's being charged. Property may be in the garnishee's hands, in which the defendant has an interest, but which the garnishee may be under no legal obligation to deliver to him; and as the plaintiff can exercise no greater control over the property in such case than the defendant could, the garnishee cannot be charged. There may, too, be property in the garnishee's hands, the legal title to which is in the defendant, and for which the defendant might maintain an action against the garnishee, and yet the latter not be liable as garnishee. Such, for instance, is the case of a party who has

[1] Grant *v.* Shaw, 16 Mass. 341. The report of this case does not indicate clearly the point stated in the text, but in Andrews *v.* Ludlow, 5 Pick. 28, it is stated by WILDE, J., to have been decided on that ground.

[2] Andrews *v.* Ludlow, 5 Pick. 28; Nickerson *v.* Chase, 122 Mass. 296.

[3] Ward *v.* Lamson, 6 Pick. 358. The question of actual and constructive possession does not seem to have been before the court in this case. See McDonald *v.* Gillett, 69 Maine, 271.

[4] *Post*, § 490; Cushing's Trustee Process, § 101; Skowhegan Bank *v.* Farrar, 46 Maine, 293, Huot *v* Ely, 17 Florida, 775; Atwood *v.* Hale, 17 Missouri Appeal, 81.

taken the goods of another by trespass, and who cannot, in respect thereof, be held as garnishee of the owner, though the legal title is in the latter, and he might maintain an action for the trespass.[1] Such, too, is the case of one in whom the legal title to goods is vested, but who has no interest of his own in them.

§ 486. The doctrine here advanced may be illustrated by several cases which have arisen; and it will be considered, 1. with reference to privity of contract between the garnishee and the defendant, and, 2. with reference to privity of interest between them.

§ 487. 1. *Privity of Contract.* Money was placed in the hands of certain trustees, to be by them appropriated, at their discretion, for the maintenance and support of a son of the donor, during his life, and afterwards to distribute it among the other children of the donor. While yet a portion of the money was in the hands of the trustees, they were summoned as garnishees of the son; and the court held, that they could not be charged, because they were in no view indebted to him, and he could maintain no action for the sum committed in trust to them. Here, the defendant had an interest in the money in the garnishee's hands, but there was no privity of contract.[2] A. made his bond to B., conditioned to pay B. a yearly sum during the life of C., to be applied by B. to the maintenance of C., his wife or family, or any member of it, according to B.'s judgment and discretion. A. was summoned as garnishee of B. and C., at a time when a portion of the annuity was due and unpaid; and the court held, that he could not be charged as garnishee of either, because, *first*, he was under no legal obligation to C., the *cestui que trust*, and C. could maintain no action against him; and, *second*, though B., the trustee, might maintain an action against him for the money, yet B. was to receive the money, not for his own use, but to be applied to the support of C. In other words, between A. and C. there was no privity of contract, and B. had no interest in the money.[3] A sheriff attached goods of the defendant's, and employed an auctioneer to sell them at public auction, and the auctioneer, while the proceeds of the sale were in his hands, was summoned as garnishee of the defendant;

[1] Despatch Line *v.* Bellamy Man. Co., 12 New Hamp. 205. See Everett *v.* Herrin, 48 Maine, 537.

[2] White *v.* Jenkins, 16 Mass. 62.

[3] Brigden *v.* Gill, 16 Mass. 522. See Hinckley *v.* Williams, 1 Cushing, 490; McIlvaine *v.* Lancaster, 42 Missouri, 96.

and it was held, that he was not liable, as there was no privity between him and the defendant; and that he should account to the officer who employed him.[1] A. received a certain sum of money from B., for the purpose of paying off a mortgage resting upon the land of C. A. was summoned as garnishee of C., and was discharged, because the money was not C.'s, and because there was no privity between A. and C.[2] So, where A. delivers to his agent B. money to be paid over to C. Until C. acquires a knowledge of the delivery to B. for that purpose, and B. has agreed with him to deliver it to him, there is no privity of contract between them, and B. cannot be charged as garnishee of C.[3] So, where a son was permitted to build a house on his father's land, under the expectation that the land would, by devise, come to him at the death of his father, and the father was summoned as garnishee of the son; it was held, that he could not be charged, because there was no contract, express or implied, that he should be accountable to the son for the value of the house.[4] So, where certain policies of insurance were assigned by A. to B., and the assignment contained a clause to the effect that any surplus of the proceeds of the policies should be paid to C., who was not a party to the assignment; it was held, that B. could not be charged as garnishee of C., because there was no privity of contract between B. and C.[5]

§ 488. A garnishee answered that he had in his hands a sum of money belonging to A., and that he had received notice of an assignment of the money by A. to the defendant; but it did not appear that the garnishee had ever promised the defendant to pay it to him; and he was held not to be chargeable, because, though an action for the money might be maintained against him in the name of A., for the defendant's use, yet there was

[1] Penniman *v.* Ruggles, 6 New Hamp. 166.

[2] Wright *v.* Foord, 5 New Hamp. 178.

[3] *Post*, § 514; Neuer *v.* O'Fallon, 18 Missouri, 277. See Briggs *v.* Block, Ibid. 281; Barnard *v.* Graves, 16 Pick. 41; Huntley *v.* Stone, 4 Wisconsin, 91; Felch *v.* Eau Pleine L. Co., 58 Ibid. 431; Eichelberger *v.* Murdock, 10 Maryland, 373; Nicholson *v.* Crook, 56 Ibid. 55; Towne *v.* Griffith, 17 New Hamp. 165; Burnham *v.* Beal, 14 Allen, 217; Kelly *v.* Roberts, 40 New York, 432; Kelly *v.* Babcock, 49 Ibid. 318.

[4] Wells *v.* Banister, 4 Mass. 514; Bean *v.* Bean, 33 New Hamp. 279. But where the property in the garnishee's hands is in the name of one as a trustee, holding it merely for the use of the defendant, this presents no obstacle to holding it by garnishment, because the beneficial interest is in the defendant, accompanied with a present right of possession and enjoyment. Raynes *v.* Lowell I. B. Society, 4 Cushing, 343.

[5] Field *v.* Crawford, 6 Gray, 116.

no privity of contract between him and the defendant, which would make him liable.[1]

§ 489. 2. *Privity of Interest.* The next class of cases illustrative of the general doctrine advanced is, where there is a privity of contract between the garnishee and the defendant, but no privity of interest. In such cases, though the garnishee have in his possession property or money which he is bound by contract to deliver or pay to the defendant, and for which, therefore, the defendant might maintain an action against him, yet he cannot be charged as garnishee in respect thereof, because the defendant himself has no interest therein. Such are the cases where the effects in the garnishee's hands belong to the defendant as a mere trustee or agent for others. There, it is not only sound doctrine technically, but in entire accordance with every principle of justice, that though the legal title to the effects in the garnishee's possession be in the defendant, yet as they do not in fact belong to him, but to others, they shall not be taken to discharge his debts.[2] Therefore, where it appeared from the answer of the garnishee, that he had executed a bond to the defendant, the condition of which was, that he should pay the defendant a certain sum, part of which only was the defendant's property, and the rest for the benefit of other persons; the court held that the garnishee should not be charged for that part of the bond which was due to the other persons.[3] So, in the case previously referred to, where A. had given a bond to B., by which he bound himself to pay B. a certain yearly sum, to be appropriated to the support of C., and A. was summoned as garnishee of B.; he could not be charged, because the money due on the bond was not B.'s own, but was to be appropriated for the use of others.[4] So, where a factor *del credere* sold goods of his principal, without the purchaser knowing at the time that he was a factor, but was afterwards notified by the owner of the goods that they were his; it was decided that the debt due for the goods belonged to, and was claimable by, the principal, and that the purchaser could not be held as garnishee of the factor, for anything beyond the amount of the factor's lien for his commission.[5] So, where

[1] Folsom *v.* Haskell, 11 Cushing, 470.

[2] Simpson *v.* Harry, 1 Devereux & Battle, 202. See Miller *v.* Richardson, 1 Missouri, 310; Jones *v.* Ætna Ins. Co., 14 Conn. 501; Pickering *v.* Wendell, 20 New Hamp. 222; Chapin *v.* Conn. R. R. Co., 16 Gray, 69; Halpin *v.* Barringer, 26 Louisiana Annual, 170; Granite Nat. Bank *v.* Neal, 71 Maine, 125; Richardson *v.* Whiting, 18 Pick. 530.

[3] Willard *v.* Sturtevant, 7 Pick. 194.

[4] Brigden *v.* Gill, 16 Mass. 522.

[5] Titcomb *v.* Seaver, 4 Maine, 542.

goods are transported over two or more connecting railroads, the freight on which for the whole distance is, by arrangement between them, to be collected of the consignee by the road which delivers the goods to him; if the consignee be summoned as garnishee of that road, he can be charged only for so much of the freight money as that road earned; for, though he is in privity of contract with it, the privity of interest extends only to that part of the money which belongs to it.[1]

§ 490. *Privity of Contract and of Interest combined.* We see from the foregoing citations the force and scope of the doctrine that privity of contract and of interest must in general combine in order to charge the garnishee in respect of property of the defendant, and, wherever such combination exists, there is a right of action in the defendant against the garnishee, either at the present or a future time. The presentation of a few cases illustrative of this point will close the consideration of this branch of the subject. Where a fund is in the hands of a trustee on a trust which the *cestui que trust* can at any moment revoke by a demand of the money, and on a refusal of payment can immediately maintain an action in his own name to recover it, the trustee can be held as garnishee of the *cestui que trust* on account of the fund.[2] So, where a fund is held by a trustee for four *cestuis que trust*, and their proportional shares have been adjusted on a bill in equity brought against him by three of them, he is chargeable as garnishee for the share of the fourth *cestui que trust*.[3] So, where property is placed in the hands of one, to be sold, and the proceeds applied to a particular purpose, and upon the sale there appears a surplus of money over what is necessary for the given purpose, he is chargeable as garnishee of the person to whom the property belonged.[4] So, one holding real estate of the defendant in his own name, but in trust for the defendant, and accountable to the defendant for the rents and profits thereof, or for the proceeds of the same, if sold, is liable as garnishee of the defendant, to the amount of the rents and profits in his hands.[5] So, where a sum of money was bequeathed to trustees

[1] Gould *v.* Newburyport R. Co., 14 Gray, 472; Bowler *v.* European & N. A. R. Co., 67 Maine, 395. See First Nat. Bank *v.* P. & O. R. Co., 2 Federal Reporter, 831.

[2] Estabrook *v.* Earle, 97 Mass. 302.

[3] Haskell *v.* Haskell, 8 Metcalf, 545.

[4] Pierson *v.* Weller, 3 Mass. 564; New England Mar. Ins. Co. *v.* Chandler, 16 Ibid. 275; Webb *v.* Peale, 7 Pick. 247; Richards *v.* Allen, 8 Ibid. 405; Hearn *v.* Crutcher, 4 Yerger, 461; Cook *v.* Dillon, 9 Iowa, 407; McLaughlin *v.* Swann, 18 Howard Sup. Ct. 217.

[5] Russell *v.* Lewis, 15 Mass. 127.

who were required to pay annually the interest thereon to A.; it was held, that the trustees might be charged as garnishees of A. in respect of the interest.[1] So, where the principal in a bond to the United States, having become a defaulter and left the country, his surety paid, without suit, $1,000, and then arrested the principal in Matanzas, in a suit on a bond of indemnity, and upon receiving $2,000 gave this bond up to the principal. The bond to the United States was afterwards put in suit, and the judgment recovered on it was satisfied by a levy upon land supposed to belong to the principal, which the United States afterwards sold, and the sum paid by the surety was restored to him. After this the surety was summoned as garnishee of the principal, and it was held, that the principal was entitled to recover back the money paid in Matanzas, and that the surety was therefore liable as his garnishee.[2] So, where property claimed by A., being libelled in an admiralty court as a prize, was delivered to B., to indemnify him for bonds given by him in that court in behalf of A., and after a decree of restitution by which the bonds so given were discharged, B. was summoned as garnishee of A., he was charged as such, because A. had a right of action against him to recover the property so delivered.[3] So, where a garnishee answered that, as guardian of an infant, he had sold land to the defendant, under a license of court, but that he had not given the bond nor taken the oath required by law previous to such sale; that part of the purchase-money had been paid, and a deed had been executed and placed in the hands of a third person, to be delivered when the residue should be paid; and that the defendant, soon after the sale, entered and was still in possession of the land; it was held, that, because there was neither oath nor bond of the guardian, the sale was invalid, and the purchaser, who was the defendant in the attachment, had a right of action against the guardian to recover back what he had paid of the purchase-money, and therefore the guardian was liable as his garnishee.[4] So, one who contracts to sell personal property, in his possession, but of which he is not the owner, to be delivered at a future day, and receives the purchase-money, but does not deliver the property, by reason of its having been reclaimed by the real owner, may be held as garnishee of the vendee for the amount of the purchase-money.[5]

[1] Matthews v. Park, 1 Pittsburgh, 22; Park v. Matthews, 36 Penn. State, 28; 2 Grant, 136.

[2] Watkins v. Otis, 2 Pick. 88.

[3] Thompson v. Stewart, 3 Conn. 171.

[4] Williams v. Reed, 5 Pick. 480.

[5] Edson v. Trask, 22 Vermont, 18.

§ 491. But it has been held, that it is not always necessary that privity of contract and of interest should combine to render the garnishee liable. Where there is privity of contract, but not of interest, but the position of affairs between the garnishee and the defendant is such that, to exempt the garnishee from liability would tend to an evasion of the force and effect of the law, and to open the door for fraud, the garnishee will be charged, though the privity of interest do not exist. This was held in a case in Pennsylvania, where in an attachment against A., the Bank of the United States was summoned as garnishee; and it appeared that after the garnishment (an attachment in Pennsylvania having the effect of holding effects coming into the garnishee's hands *after* he is garnished), the defendant deposited in the bank sundry sums of money, and also procured the bank to purchase or discount drafts drawn by him in his own name, the proceeds of which were passed to his credit. The moneys thus passed to the defendant's credit were drawn out on his checks. It appeared that, though the accounts were kept with the defendant in his own name, he was in fact the agent of others in all the transactions, and the jury found that all the funds were deposited and drawn out by him as agent for others. Notwithstanding the jury thus found, the court, on grounds of public policy, and for the prevention of fraud, held the bank liable as garnishee of A.[1] And in Nebraska, where the loaning of any part of the public money by a public officer is declared to be a high crime, punishable by fine and imprisonment in the penitentiary, a county treasurer deposited in a bank, subject to his drafts as county treasurer, a sum of money, collected by him as taxes, the account of which deposit was in the name of "York county, Nebraska, by L. J. G., treasurer;" and while the money was so deposited the bank was summoned as garnishee of L. J. G. It was urged against the liability of the bank as garnishee, that the money was public money, and under official control, and ought not to be used to pay the private debts of the county treasurer; which might have been a sufficient defence if the deposit had been a special one; but the court held, that a depositing of money, generally, in a bank was, in legal effect, the loaning of it to the bank; that such loaning of public money

[1] Jackson *v.* Bank U. S., 10 Penn. State, 61. See Paxson *v.* Sanderson, 2 Philadelphia, 303. In Bank of Northern Liberties *v.* Jones, 42 Penn. State, 536, the court said: "Notwithstanding the disapprobation of a learned judge [in Paxson *v.* Sanderson] we hold Jackson *v.* Bank of the United States to be good law, and it is not our intention to disturb it." Followed by the Supreme Court of the District of Columbia, in Reynolds *v.* Smith, 18 Dist. Columbia (7 Mackey), 27.

by a public officer was a crime, the doing of which the court could not construe as conferring any rights upon either of the participants in it; that neither party to such a prohibited transaction could be heard in a court of justice to urge such act, or any quality thereof, either as a cause of action or ground of defence; that the bank had no defence against the garnishment on the ground that the funds which it received from L. J. G. were county funds which he was prohibited by public law from depositing in any bank; and that it did not lie in his mouth to deny that the funds were his private money, which alone he had the right to deposit in bank, and the bank had a right to receive from him on deposit; and upon these grounds the bank was charged as garnishee.[1]

§ 491 *a*. If money be deposited in a bank to the credit of "A. B., agent," with nothing in the account to indicate the name of any other person as principal; and A. B. does not, when making the deposit, or before or afterwards, disclose the name of any principal; and the bank is summoned as A. B.'s garnishee, and has no knowledge of any principal; the court will consider the money to belong to A. B., and will charge the bank as his garnishee.[2] But where money is deposited in a bank by one *as agent*, and the account is understood both by the depositor and the bank to be an agency account, containing only the moneys of another person for whom he was agent, and no moneys of his own, it may be attached as the money of his principal;[3] but it can no more be subjected by garnishment to the payment of the agent's debt, than any other money of his principal could be; for though there is privity of contract between the bank and the defendant, there is no privity of interest.[4] And in such case the account itself is notice to the bank that the money is not the defendant's, and the latter is a competent witness to prove that it did not belong to him, but to others.[5] And where a deposit was made in the agent's name, without designation of his representative character, but the principal, after the garnishment of the bank, gave notice to it that the money was his, and not the agent's, it was held not to be attachable for the debt of the agent.[6]

[1] First Nat. Bank *v.* Gandy, 11 Nebraska, 431.

[2] Proctor *v.* Greene, 14 Rhode Island, 42.

[3] Gregg *v.* F. & M. Bank, 80 Missouri, 251.

[4] Bank of Northern Liberties *v.* Jones, 42 Penn. State, 536; Jones *v.* Bank of Northern Liberties, 44 Ibid. 253.

[5] Jones *v.* Bank of Northern Liberties, 44 Penn. State, 253; McCormac *v.* Hancock, 2 Ibid. 310; Granite Nat. Bank *v.* Neal, 71 Maine, 125.

[6] Farmers' & Mechanics' Nat. Bank *v.*

§ 491 *b*. When the money of one is deposited in a bank in the name of another, whether the depositor is or is not the agent or trustee of the other, it is the unquestionable right of the true owner, when the bank is summoned as garnishee of the depositor, to intervene in the action and assert his title to the money; proving which the court will release the attachment.[1] But if such owner, knowing of the garnishment of the bank in a suit against the depositor for his own debt, takes no step to assert his right to the money, and the bank is charged as garnishee, and pays the amount for which it is charged, the true owner cannot maintain an action against the bank for the money, but must seek his remedy against the depositor, even though the bank was informed by the depositor, when the deposit was made, of the true ownership of the money.[2]

King, 57 Penn. State, 202; Morrill *v.* Raymond, 28 Kansas, 415.

[1] Reynolds *v.* Smith, 18 Dist. of Columbia 7 Mackey), 27.

[2] Randall *v.* Way, 111 Mass. 506.

CHAPTER XXII.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY THE CAPACITY IN WHICH HE HOLDS THE DEFENDANT'S PROPERTY.

§ 492. THE frequent occasions when money or other property is in the hands of officers of the law, and of persons acting under legal authority, would naturally give rise to efforts to reach it by attachment against the individuals claiming it, or to whom it might be supposed to belong; and such efforts have been made, in reference to almost all descriptions of persons holding property or money under official or legal authority. Administrators, executors, and guardians, ministerial, judicial, and disbursing officers, and municipal corporations, have all, at times, been subjected to garnishment, and numerous adjudications as to their liability have been the result.

§ 493. In Massachusetts, at an early day, the ground was taken, that a public officer who has money in his hands to satisfy a demand which one has upon him merely as a public officer, cannot, for this cause, be adjudged a garnishee. The case was that of a county treasurer, who disclosed in his answer that he had a certain sum of money in his possession, officially, which was due to the defendant for services as a juror, and which he was by law bound to pay to the defendant. The court decided against the garnishment on two grounds; one, having relation to the peculiar statute of the State, the other as stated above; but it is evident that, had the former ground not existed, the latter would have been considered sufficient.[1] The same principle was recognized and applied in Connecticut.[2]

§ 494. The Supreme Court of Massachusetts took a step further, and announced the broader principle, that no person

[1] Chealy *v.* Brewer, 7 Mass. 259. See Clark *v.* Clark, 62 Maine, 255; Wilson *v.* Ridgely, 46 Maryland, 235; Bulkley *v.* Eckert, 3 Penn. State, 368; Pierson *v.* McCormick, 1 Penn. Law Journal R. 201.

[2] Stillman *v.* Isham, 11 Conn. 124.

deriving his authority from the law, and obliged to execute it according to the rules of law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority.[1] The Supreme Court of Illinois stated the law to be, that a person deriving his authority from the law to receive and hold money or property, cannot be garnished for the same when held by him under such authority.[2] The Supreme Court of Alabama declared it to be well established that a public officer, who has public moneys in his custody, for disbursement in satisfaction of demands on the government, cannot be summoned as the garnishee of one having a legal right to demand and receive from him such moneys.[3]

§ 495. Having stated the general rule, in its threefold form of expression by different courts, we proceed to examine its application to the various descriptions of persons holding money or property in an official or legal capacity.

§ 496. *Administrators.* In the Massachusetts case just cited, the garnishee answered that he had no goods, effects, or credits of the defendant in his possession, except as he was administrator of P. B., deceased; that previous to the death of the said P. B., the defendant had commenced a suit against P. B., to recover the value of certain hides, which suit was pending at the time of the garnishee's answer. The court, without adverting to the facts of the case, or, as before stated, to the terms of the statute, laid down the comprehensive rule above indicated, merely adding, "We have determined this in the case of public officers, and the reason of those decisions applies with equal force to the case of an administrator."[4]

The Supreme Court of Maine recognized and enforced the same principle, in a case where the intestate was clearly indebted to the defendant, and the administrator had money in his hands ready to pay the debt.[5] And so in Rhode Island.[6]

In Vermont, the court admitted that without the aid of express statute, the garnishment of an administrator was inadmissible.[7]

[1] Brooks *v.* Cook, 8 Mass. 246. See Colby *v.* Coates, 6 Cushing, 558; Thayer *v.* Tyler, 5 Allen, 94; Ladd *v.* Gale, 57 New Hamp. 210

[2] Millison *v.* Fisk, 43 Illinois, 112.

[3] Pruitt *v.* Armstrong, 56 Alabama, 306.

[4] Brooks *v.* Cook, 8 Mass. 246.

[5] Waite *v.* Osborne, 11 Maine, 185.

[6] Conway *v.* Armington, 11 Rhode Island, 116.

[7] Parks *v.* Cushman, 9 Vermont, 320.

In Delaware,[1] and in West Virginia,[2] an administrator cannot be summoned as garnishee.

In Arkansas, administrators are considered exempt from garnishment, even after a demand has been allowed against the estate, in favor of the defendant, and an order made by the probate court upon the administrator to pay it.[3]

In Alabama, it seems to be conceded that an administrator may be charged as garnishee in respect of a debt due from his intestate to the defendant,[4] but not unless he is summoned in his representative capacity.[5] But it was there held, that an administrator could not be charged as garnishee of one of the heirs of an estate, in respect of the undivided and unascertained interest of the heir in the estate.[6]

In Illinois, an administrator cannot be charged as garnishee of an heir of his intestate, before an order of distribution has been made by the probate court;[7] but may be afterwards.[8] And so in Oregon.[9]

But this immunity has been held to extend only to the person himself, holding money or property in this representative capacity. Therefore, one who had collected for A., executor of a decedent, the amount of a promissory note made payable to A., *as executor*, was charged as garnishee in a suit against A. in his private capacity.[10] The same would doubtless have been done if A. had been an administrator, and the note had been payable to him as such.

§ 497. In New Hampshire, Delaware, and Missouri, while the principle announced in Massachusetts was recognized as sound, it was considered to be inapplicable, where the administrator had, by the proper tribunal, been adjudged and ordered to pay a certain sum to a creditor of the estate; and in such case the administrator was charged as garnishee of the party to whom the

[1] Marvel v Houston, 2 Harrington, 349. In this case it was also ruled that under an execution issued on a judgment rendered against an administrator for a debt of his intestate, a debtor of the decedent could not be garnished. And see Hartshorne v. Henderson, 3 Penn. Law Journal R., 511.

[2] Parker v. Donnally, 4 West Virginia, 648.

[3] Thorn v. Woodruff, 5 Arkansas, 55; Fowler v. McClelland, Ibid. 188.

[4] Terry v. Lindsay, 3 Stewart & Porter, 317; Tillinghast v. Johnson, 5 Alabama, 514.

[5] Tillinghast v. Johnson, 5 Alabama, 514.

[6] Mock v. King, 15 Alabama, 66.

[7] Crownover v. Bamburg, 2 Bradwell, 162.

[8] Bartell v. Bauman, 12 Bradwell, 450.

[9] Harrington v. La Rocque, 13 Oregon, 344.

[10] Coburn v. Ansart, 3 Mass. 319. But see Lessing v. Vertrees, 32 Missouri, 431.

money was ordered to be paid.[1] The reason of this exception was given by the Superior Court of New Hampshire, and adopted by the Supreme Court of Missouri. In the language of the former, "an administrator, till he is personally liable to an action in consequence of his private promise, the settlement of the estate, some decree against him, or other cause, cannot be liable to a trustee process. Because, till some such event, the principal has no ground of action against him in his private capacity; and he is bound to account otherwise for the funds in his hands. The suit against him, till such an event, is against him in his representative capacity, and the execution must issue to be levied *de bonis testatoris* and not *de bonis propriis*. But in the present case the trustee was liable in his private capacity to the defendant for the dividend. The debt had been liquidated, and a decree of payment passed. The debt was also due immediately. Execution for it would run against his own goods; and the trustee process would introduce neither delay nor embarrassment in the final settlement of the estate."[2]

§ 498. In some States statutes have been enacted authorizing the garnishment of executors and administrators, under which cases have been decided. In Vermont, such a law has been in existence since 1833; and under it an administrator, who had been decreed by the probate court to deliver property to a female distributee of the estate, was charged as garnishee of her husband; the court holding that after distribution made the property vested in the husband absolutely.[3] And where an estate had been fully settled, and it had been determined that A. was entitled to $58 as his share thereof, but the probate court had not yet made an order for its payment; the administrator was charged as garnishee of A. to that amount.[4] In Pennsylvania, under a statute which in terms authorized the garnishment of administrators, it was held, that a distributive share of personal estate could not be attached, before the administrator had settled his account, so as to show what is due from him to the distributee.[5] And in Massachusetts, where a similar statute now

[1] Adams *v.* Barrett, 2 New Hamp. 374; Fitchett *v.* Dolbee, 3 Harrington, 267; Curling *v.* Hyde, 10 Missouri, 374; Richards *v.* Griggs, 16 Ibid. 416.

[2] Adams *v.* Barrett, 2 New Hamp. 374.

[3] Parks *v.* Cushman, 9 Vermont, 320.

[4] Hoyt *v.* Christie, 51 Vermont, 48.

[5] Bank of Chester *v.* Ralston, 7 Penn. State, 482; Hess *v.* Shorb, Ibid. 231; McCreary *v.* Topper, 10 Ibid. 419. In Hartle *v.* Long, 5 Penn. State, 491, an administrator was garnished, when there was no law authorizing such a proceeding. Eleven years afterwards such a law was enacted, and the plaintiff then issued a *scire facias* to subject in the hands of the

exists, it was decided that an administrator cannot be charged under a writ served on him between the time when administration is decreed to him, and that of the filing and approval of his bond and the delivery of letters to him;[1] but may be as soon as he has given bond and received letters of administration.[2] And in Maine, under a statute authorizing "any debt or legacy, due from an executor or administrator, and any goods, effects, and credits in his hands as such," to be attached by garnishment, it was decided that an administrator could not be charged as garnishee, in respect of a negotiable promissory note of his intestate, held by the defendant, where the same statute forbids the garnishment of a person in respect of a negotiable note made by him.[3] In Connecticut, the statute authorizes courts of probate to allow out of the estate of a deceased person such amounts as they may judge proper for the support of the widow or family during the settlement of the estate. Another statute provides that when any debt, legacy, or distributive share becomes due to any one from the estate of a deceased person, his creditors may attach it in the hands of the executor or administrator. It was there held, that an allowance made by the probate court for the support of a widow could not be attached in the hands of an administrator.[4] In Mississippi, where the statute provides that "executors and administrators may be garnished for a debt due by their testator or intestate to the defendant," the insolvency of the estate does not prevent the garnishment, though the law there provides that an insolvent estate shall not be sued. The garnishment holds whatever dividend the estate may suffice to pay.[5]

§ 499. *Executors.* It is well settled in England and the United States, as a general proposition, that an executor cannot be charged as garnishee, in respect of a pecuniary legacy bequeathed by his testator.[6] To this, however, an exception would

administrator certain moneys which had then, by the death of the widow, become payable to the defendant; but the court held, that the law could have no retrospective operation, and that as the moneys were not, before its passage, liable to the attachment, no proceedings based on the original attachment could reach it.

[1] Davis *v.* Davis, 2 Cushing, 111.

[2] Wheeler *v* Bowen, 20 Pick. 563; Boston Bank *v.* Minot, 3 Metcalf, 507; Davis *v.* Davis, 2 Cushing, 111; Mechanics' Sav. B'k *v.* Waite, 150 Mass. 234.

[3] Commercial Bank *v.* Neally, 39 Maine, 402.

[4] Barnum *v.* Boughton, 55 Conn. 117.

[5] Holman *v* Fisher, 49 Mississippi, 472.

[6] Priv. Lond. 267; Toller on Executors, 4th Am. Ed. 478; Barnes *v.* Treat, 7 Mass. 271; Winchell *v.* Allen, 1 Conn. 385; Shewell *v.* Keen, 2 Wharton, 332; Barnett *v.* Weaver, Ibid. 418; Picquet *v.* Swan, 4 Mason, 443; Whitehead *v.* Coleman, 31 Grattan, 784; Case T. M. Co. *v.* Miracle, 54 Wisconsin, 295; Post *v.* Love, 19 Florida, 634.

be made, as in the case of administrators, where the executor has been ordered by the probate court to pay the amount to the legatee.[1]

The earliest American case on this subject with which we are acquainted, came up in Massachusetts, where it was held, that a pecuniary legacy in the hands of an executor is not "goods, effects, or credits;" and that the principles which exempt a public officer from garnishment, apply with equal force to the case of an executor; and this without reference to whether the garnishment took place before or after the probate of the will.[2]

The same point came up in a similar case in Connecticut, where the garnishment took place after the probate of the will, and the acceptance by the executor of his appointment. The court below instructed the jury that the executor was in contemplation of law the debtor of the defendant, the legatee, and liable to pay the plaintiff's claim out of his own estate. The Supreme Court, in reversing the judgment, said: "An executor cannot be considered as the debtor of a legatee. The claim is against the testator or his estate; and the executor is merely the representative of the deceased. There cannot be a debt due from the executor within the meaning of the statute. Nor can a person, like an executor, deriving his authority from the law, and bound to perform it according to the rules prescribed by law, be considered as a trustee, agent, attorney, or factor within the statute; and this for the best of reasons. In the common case of agents, trustees, and factors, the creditor can easily place himself in the shoes of the absconding debtor, and prosecute his claim without inconvenience to the garnishee. But such would not be the case with an executor. It would not only embarrass and delay the settlement of estates, but would often draw them from courts of probate, where they ought to be settled, before the courts of

[1] *Ante*, § 497; Fitchett *v.* Dolbee, 3 Harrington, 267.

[2] Barnes *v.* Treat, 7 Mass. 271. In Maine, under a statute providing that "any debt or legacy due from an executor or administrator, and any goods, effects, and credits in his hands, as such, may be attached by trustee process,' an executor was garnished in respect of a pecuniary legacy bequeathed to the defendant, and the writ was in the common form summoning the garnishee to appear and show cause why execution should not issue against the defendant's "goods, effects, or credits" in his hands, making no mention of the legacy. It was objected, on the authority of Barnes *v.* Treat, that legacies could not be regarded as goods, effects, or credits, and that therefore the legacy was not reached by the process; but the court held, that, as the statute authorized the attachment of legacies, and yet made no change in the form of the writ, it was equivalent to a legislative declaration that legacies should be regarded as included in one of those terms. Cummings *v.* Garvin, 65 Maine, 301.

common law, who would have no power to adjust and settle his accounts. Such an interference might produce much inconvenience, and prevent the executor from executing his office as the law directs."[1]

This subject received careful and able treatment by the Supreme Court of Pennsylvania. The question presented was, in effect, the same as in the Massachusetts and Connecticut cases, and the court, in an elaborate opinion, decided that an executor could not be charged in respect of a legacy due to the defendant.[2] This decision led to the enactment of a statute expressly authorizing creditors to attach legacies and distributive shares in the hands of an executor or administrator. But, aside from that express authority, it is held in Pennsylvania, that one cannot be garnished on account of money in his hands as administrator due the defendant;[3] and that an executor cannot be, to reach commissions due to his co-executor.[4]

§ 500. While, however, an executor cannot be charged as garnishee in respect of a legacy bequeathed by his testator, it does not follow that in no case can a legacy be subjected to attachment against the legatee; for if land be devised with a legacy charged upon it, the devisee will be held as garnishee of the legatee, in respect of the legacy.[5]

§ 501. In Massachusetts, a statute was enacted, providing that "any debt or legacy due from an executor or administrator, and any other goods, effects, and credits, in the hands of an executor or administrator, as such, may be attached in his hands by the process of foreign attachment." Under this statute it has been held, that a legacy in the hands of an executor is not such a contingent liability as will prevent its being attached; for it can be ascertained by the settlement of the estate whether there are assets sufficient for the payment; and when necessary, the court will continue the case until it can be seen whether the assets are sufficient for that purpose;[6] or, if there be not personalty sufficient for the payment, until license can be obtained to sell real

[1] Winchell *v.* Allen, 1 Conn. 385.

[2] Shewell *v.* Keen, 2 Wharton, 332. See Barnett *v.* Weaver, 2 Wharton, 418; Young *v.* Young, 2 Hill (S. C.), 425; Norton *v.* Clark, 18 Nevada, 247. The only States in which, so far as observed, the garnishment of an executor is allowed, without express statutory authority, are New Hampshire and Indiana. Palmer *v.* Noyes, 45 New Hamp. 174; Stratton *v.* Ham, 8 Indiana, 84.

[3] Ryon *v.* Marcy, 1 Luzerne Legal Register, 360.

[4] Adams's Appeal, 47 Penn. State, 94.

[5] Piper *v.* Piper, 2 New Hamp. 439; Woodward *v.* Woodward, 4 Halsted, 115.

[6] Holbrook *v.* Waters, 19 Pick. 354; Wheeler *v.* Bowen, 20 Ibid. 563.

estate for that purpose.[1] And if the executor, after being summoned as garnishee, pay over the legacy to the legatee, such payment will not protect him, and will be regarded as such an acknowledgment that there were assets in his hands, that he will not be entitled to any continuance thereafter, for the purpose of having that fact determined by the settlement of the estate.[2] In all such cases the attaching plaintiff must, if required by the executor, give bond to refund the money, if the same should be needed to satisfy any demands afterwards recovered against the estate, and to indemnify the executor.[3] But there does not seem to be a disposition in the courts of that State to extend the operation of the statute in question beyond its clear intendment; for they refused to charge an executor as garnishee of one to whose daughter a legacy was left, and which descended to him upon the death of his daughter; because, before any proceeding could be instituted against the executor for the legacy, administration on her estate was necessary, and the legacy would be assets in the hands of her administrator.[4]

§ 502. *Guardians.* Persons acting as guardians of infants are considered to stand in the same position as administrators and executors, and to come within the general principle before stated, and, therefore, not to be liable as garnishees in respect of property of their wards in their possession as guardians.[5] So, in New Hanpshire, with regard to a guardian of an insane person; at least until his accounts have been adjusted by the probate court, and a balance found in his hands.[6]

§ 503. *Sheriffs.* The same considerations which forbid the garnishment of executors, administrators, and guardians, require that all ministerial officers, having official possession of property or money, should be exempt from that proceeding. We accordingly find that, almost without exception, the courts in England[7] and this country have taken decided ground against

[1] Cady *v.* Comey, 10 Metcalf, 459.

[2] Hoar *v.* Marshall, 2 Gray, 251.

[3] Cady *v.* Comey, 10 Metcalf, 459.

[4] Stills *v.* Harmon, 7 Cush. 406.

[5] Gassett *v.* Grout, 4 Metcalf, 486; Hansen *v.* Butler, 48 Maine, 81; Perry *v.* Thornton, 7 Rhode Island, 15; Godbold *v.* Bass, 12 Richardson, 202; Vierheller *v.* Brutto, 6 Bradwell, 95. In Hicks *v.* Chapman, 10 Allen, 463, the Supreme Court of Massachusetts distinguished the case of a spendthrift under guardianship from that of a minor, and charged as garnishee a tenant of the ward's property, on account of rent due for the premises, which he was bound to pay to the guardian.

[6] Davis *v.* Drew, 6 New Hamp. 399.

[7] 1 Leonard, 30, 264; Priv. Londini, 265; Comyns's Digest, Attachment, D; Bacon's Abridgment, Customs of London, H.

all attempts to reach, by attachment, money in the hands of sheriffs, received and held by them in their official capacity.

§ 504. This subject has been presented in three aspects: 1. By the levy of an execution by an officer on money in his hands collected on execution; 2. By the levy of an attachment on such money; and 3. By the garnishment of the sheriff in respect thereof. The object aimed at in each of these cases being the same, the general principles governing each are applicable to all, and cannot be affected by the difference in the modes of attaining the same result. Whether the proceeding be by actual levy or by garnishment, cannot change the aspect of the question, since the latter is in effect as much an attachment as the former. Hence there is no just ground for the distinction which has been made in favor of allowing the money to be reached by garnishment as a *right* or *credit* in the sheriff's hands, though held not to be attachable by levy. Obviously, if its abstraction from his custody by levy be inadmissible, the law will not tolerate its abstraction by a circuitous and less direct method. We shall, therefore, in the consideration of the subject use indiscriminately the decisions relating to the three modes of proceeding above referred to.

§ 505. The first and leading case in this country, bearing on this subject, was decided by the Supreme Court of the United States. A sheriff, having collected money on execution, levied thereon an execution which he held against the person for whom the money was collected. Two questions were made: 1. Can an execution be levied on money? and 2. Can it be levied on money in the hands of the officer? The court decided the former affirmatively, and the latter in the negative, and concluded their opinion thus: "Considering the case then either on principle or authority, it appears to the court that the creditor has not such a legal property in the specific pieces of money levied for him and in the hands of the sheriff, as to authorize that officer to take those pieces in execution as the goods and chattels of such creditor." [1]

The same conclusion was reached in Kentucky, in a case where the facts were almost identical.[2] And so in Missouri;[3] and in Ohio, where an attachment was levied on money collected under execution.[4]

[1] Turner *v.* Fendall, 1 Cranch, 117.
[2] First *v.* Miller, 4 Bibb, 311.
[3] State *v.* Boothe, 68 Missouri, 546.
[4] Dawson *v.* Holcombe, 1 Ohio, 135.

§ 506. If, then, money in the hands of a sheriff in his official capacity cannot be levied on by execution or attachment, can it be reached by garnishment? In Vermont and New Jersey, the courts have held, that though the levy is impracticable, yet the garnishment may be maintained, on the ground that the money is a right or credit of the defendant's in the sheriff's possession.[1] In New Hampshire, the doctrine was at one time incidentally asserted, that the sheriff could not be garnished *before* the return day of the execution;[2] but afterwards the same court receded from this view, and sustained such a garnishment.[3] These decisions are, however, overborne by the weight of authority.

This question received an early consideration and decision in Massachusetts. A sheriff had collected money on execution, and before the writ was returnable the money was attached in his hands by garnishment, under an attachment against the execution creditor. The court were unanimous in discharging the garnishee.[4]

This case, it will be remarked, presented the question of garnishment of a sheriff *before* the return day of the execution. In a subsequent case, where the garnishment took place *after* the return of the execution, the same court affirmed and applied its previous decision.[5]

A later expression of the views of that court on this subject, was in a case where an officer, charged with the service of criminal process against a person, arrested him, and, as incidental to the service of the process, took from him money and property found in his possession. The next day, being satisfied that the prisoner had committed no crime, he went to the jail to return the money and property to him, and when about entering the jail was summoned as garnishee of the prisoner. The question was, whether the officer was exempt from garnishment, under that clause of the statute which declared that no person should be adjudged a trustee "by reason of any money in his hands as a public officer, and for which he is accountable, merely as such officer, to the principal defendant." The court held, that the

See Prentiss *v.* Bliss, 4 Vermont, 513; Dubois *v.* Dubois, 6 Cowen, 494; Crane *v.* Freese, 1 Harrison, 305; Reddick *v.* Smith, 4 Illinois (3 Scammon), 451.

[1] Conant *v.* Bicknell, 1 D. Chipman, 50; Hurlburt *v.* Hicks, 17 Vermont, 193; Lovejoy *v.* Lee, 35 Ibid. 430; Crane *v.* Freese, 1 Harrison, 305; Davis *v.* Mahany, 9 Vroom, 104; Conover *v.* Ruckman, 33 New Jersey Equity, 303.

[2] Adams *v.* Barrett, 2 New Hamp. 374.

[3] Woodbridge *v.* Morse, 5 New Hamp. 519.

[4] Wilder *v.* Bailey, 3 Mass. 289.

[5] Pollard *v.* Ross, 5 Mass. 319.

money was taken by the officer in the performance of his official duty, and that, therefore, he could not be charged in respect thereof.[1]

The Massachusetts doctrine has been also established in Maryland, North Carolina, South Carolina, Alabama, Tennessee, Illinois, Missouri, Wisconsin, California, and in the U. S. Circuit Court in Vermont, and incidentally recognized in Maine.[2] Viewed either as sustained by authority, or as resting on sound principles, it may properly be considered as settled.

§ 507. If money collected cannot be so reached, it follows, *a fortiori*, that a sheriff cannot be charged as garnishee in respect of an execution in his hands upon which the money has not been collected.[3]

§ 508. But though a sheriff holding money received in payment of an execution, and which ought to be paid to the execution creditor, cannot in respect thereof be garnished, yet there are other circumstances in which his official character affords him no protection from garnishment. In all the cases considered, the money was in the sheriff's hands *virtute officii*, and therefore in the custody of the law. But where money in his hands has ceased to be in such a position as to claim the protection of the law, he will be subject to garnishment, as any other person would be. Therefore, where a sheriff, holding an execution, sells property, and after satisfying the execution there is a surplus in his hands, it is considered to belong to the defendant, and to be held by the sheriff in a private, and not in his official, capacity, and may, therefore, be reached by the defendant's creditors, either by direct attachment or by garnishment.[4] The same

[1] Robinson *v.* Howard, 7 Cushing, 257; Morris *v.* Penniman, 14 Gray, 220.

[2] Farmers' Bank *v.* Beaston, 7 Gill & Johnson, 421; Jones *v.* Jones, 1 Bland, 443; Overton *v.* Hill, 1 Murphey, 47; Blair *v.* Cantey, 2 Speers, 34; Burrell *v.* Letson, Ibid. 378; 1 Strobhart, 239; Zurcher *v.* Magee, 2 Alabama, 253; Pawley *v.* Gains, 1 Tennessee, 208; Drane *v.* McGavock, 7 Humphreys, 132; Lightner *v.* Steinagel, 33 Illinois, 510; Marvin *v.* Hawley, 9 Missouri, 382; Clymer *v.* Willis, 3 California, 363; Staples *v.* Staples, 4 Maine, 532; Waite *v.* Osborne, 11 Ibid. 185; Hill *v.* La Crosse & M. R. R. Co., 14 Wisconsin, 291; Clarke *v.* Shaw, 28 Federal Reporter, 356.

[3] Sharp *v.* Clark, 2 Mass. 91.

[4] Watson *v.* Todd, 5 Mass. 271; Orr *v.* McBryde, 2 Carolina Law Repository, 257; King *v.* Moore, 6 Alabama, 160; Tucker *v.* Atkinson, 1 Humphreys, 300; Davidson *v.* Clayland, 1 Harris & Johnson, 546; Jaquett *v.* Palmer, 2 Harrington, 144; Wheeler *v.* Smith, 11 Barbour, 345; Hearn *v.* Crutcher, 4 Yerger, 461; Pierce *v.* Carleton, 12 Illinois, 358; Lightner *v.* Steinagel, 33 Ibid. 510; Dickison *v.* Palmer, 2 Richardson Eq. 407; Hill *v.* Beach, 1 Beasley, 31; Lovejoy *v.* Lee, 35

rule extends to a receiptor, in whose hands the officer has placed attached property. If there is more than sufficient to satisfy the attachment, the receiptor may be charged as garnishee of the defendant in respect of the surplus.[1] And where one who had been sheriff, received while in office a list of fees to collect for a register of a county and made collections thereof, and after both he and the register had gone out of office he was summoned as garnishee of the latter, it was held, that the money collected by him was not *in custodia legis*, and that he was chargeable as garnishee in respect thereof.[2] And in Connecticut, where an execution commands the sheriff "that of the money of the said defendant, or of his goods, chattels, or lands, within your precincts, you cause to be levied, *and paid and satisfied unto the plaintiff*" the judgment debt and costs, it was decided that this language, instead of the ordinary command to the officer to have the money *in court*, made him the agent of the plaintiff in its collection, and that he might be charged as garnishee of one for whom he had collected money on execution.[3] And in Mississippi, under a statute by which an officer who collects money under an execution, and does not "immediately pay the same to the party entitled thereto, or his attorney, on demand made," is liable to summary proceedings for the money, and heavy damages, it was held, that a constable could be garnished in respect of money he had collected on execution.[4] And in Wisconsin, a constable was charged as garnishee of a defendant in an attachment suit, where he had in his hands money derived from the sale under execution of property attached, and it appeared that the whole proceedings in the attachment suit were null and void, and so he could not pay over the money to the plaintiff therein.[5] And in Missouri, where the defendant in an action of replevin, in order to be allowed to retain the property, deposited a sum of money in the hands of the sheriff, when no statute authorized such a proceeding; and the sheriff was summoned as garnishee of the defendant; it was decided that the money was not *in custodia legis*, but was held by the sheriff as a mere private bailee, and he was charged as garnishee.[6]

Vermont, 430; Adams *v.* Lane, 38 Ibid. 640; Roddey *v.* Erwin, 31 South Carolina, 36; Evans *v.* Virgin, 72 Wisconsin, 423.

[1] Cole *v.* Wooster, 2 Conn. 203.

[2] Robertson *v.* Beall, 10 Maryland, 125.

[3] New Haven Saw-Mill Co. *v.* Fowler, 28 Conn. 103.

[4] Burleson *v.* Milan, 56 Mississippi, 399.

[5] Storm *v.* Adams, 56 Wisconsin, 137.

[6] Johnson *v.* Mason, 16 Missouri Appeal, 271.

§ 509. *Clerks of Courts.* The principles applied to administrators, executors, guardians, and sheriffs, are applicable to clerks of courts, who frequently have money of others in their possession officially. It has been decided, that money paid into the hands of a clerk on a judgment,[1] money in the possession of a clerk in any manner in virtue of his office,[2] and money paid into court,[3] cannot be attached. But money in the hands of a clerk, arising from a sale of land in partition, which he has been ordered by the court to pay over to the parties concerned, may, after such order, be attached.[4] And money deposited with a clerk, in lieu of a bond, on appeal from the judgment of his court, may be attached, so far as to hold the rights of the depositor therein, but not so as to interfere with the clerk's possession or control.[5] And where a court appointed a manager to work certain mines, and ordered moneys derived therefrom to be paid into court to await the decision of a certain question; it was held, after the decision was had, and the money was no longer needed to meet any judgment of the court, that it might be attached in the hands of the clerk.[6] So, where money is paid into the hands of a clerk by the decree of a court, for a specific purpose, and the purpose of the legal custody is accomplished, and his only duty is to pay it over to a certain party, he may be charged as garnishee of that party.[7]

If money in the official possession of a clerk cannot be reached by garnishment, much less can the service of an attachment on him have the effect of attaching orders made out by him on the county treasury, but undelivered to the party in whose favor they were drawn;[8] or of attaching a judgment in favor of the attachment defendant, remaining of record in his court.[9] And still less is the officer authorized to seize the record of the judgment. The only mode of reaching the judgment in such case is to summon the judgment debtor as garnishee.[10]

[1] Ross *v.* Clarke, 1 Dallas, 354; Alston *v.* Clay, 2 Haywood (N. C.), 171.

[2] Hunt *v.* Stevens, 3 Iredell, 365; Drane *v.* McGavock, 7 Humphreys, 132; Smith *v.* Finlen, 23 Illinois Appellate, 156; Weaver *v.* Cressman, 21 Nebraska, 675; Sweetzer *v.* Claflin, 74 Texas, 667.

[3] Farmers' Bank *v.* Beaston, 7 Gill & Johnson, 421; Murrell *v.* Johnson, 3 Hill (S. C.), 12; Bowden *v.* Schatzell, Bailey Eq. 360. *Sed contra*, Phelan *v.* Ganebin, 5 Colorado, 14.

[4] Gaither *v.* Ballew, 4 Jones, 488.

[5] Dunlop *v.* Paterson F. I. Co., 19 New York Supreme Court, 627; 74 New York, 145. But see Pace *v.* Smith, 57 Texas, 555.

[6] Trotter *v.* Lehigh, Z. & I. Co., 41 New Jersey Eq. 229.

[7] Wilbur *v.* Flannery, 60 Vermont, 581.

[8] Merrell *v.* Campbell, 49 Wisconsin, 535.

[9] Daley *v.* Cunningham, 3 Louisiana Annual, 55.

[10] Hanna *v.* Bry, 5 Louisiana Annual, 651.

a justice of the peace, to be paid into the hands of the justice. It would seem to follow, from the numerous decisions previously considered, that such an officer could not be garnished in respect of money so received, and in Pennsylvania it has been so held.[1] But in Alabama, it was decided otherwise, on the ground (peculiar to their system of laws) that the justice is not merely a judicial officer in relation to the collection of small debts, but the agent of the person who intrusts their collection with him; and that as soon as the money is collected, his character as a magistrate ceases, and he holds it as any other agent.[2]

§ 511. *Trustees of Insolvents, and Assignees in Bankruptcy.* In Massachusetts, it has been decided that effects in the hands of an assignee of a bankrupt cannot be reached by garnishment, as they are not the effects of the bankrupt, but are by law vested in the assignee.[3] Upon the same ground, and also because the attachment, under such circumstances, of the effects of a bankrupt or insolvent would utterly defeat the whole policy of the bankrupt or insolvent laws, the same decision has been made in Maryland, with regard to assignees in bankruptcy and trustees of insolvent debtors.[4] In the former State, however, this exemption of assignees in bankruptcy was at one time held to extend only to cases where it was sought to reach the bankrupt's effects to subject them to the payment of his debts. Therefore, where an assignee was garnished in an action against a creditor of the bankrupt, to whom a dividend of the bankrupt's estate was due, he was charged as garnishee.[5] It does not, however, appear that the question was raised whether an officer of this kind was exempted by his official character from the operation of this process. But recently the Supreme Court of that State overruled the cases just cited, and held that an assignee under the insolvent law, having money in his hands, payable to the defendant as a creditor of the insolvent, could not be charged as garnishee in respect thereof.[6]

In the course of the administration of the Bankruptcy Act of 1867, this matter came up several times, and it was decided that money in the hands of an assignee in bankruptcy, which he had been ordered to pay to the bankrupt's creditors, could not be

[1] Corbyn *v.* Bollman, 4 Watts & Sergeant, 342; Rockey *v.* Carson, 4 Penn. County Ct. 543.

[2] Clark *v.* Boggs, 6 Alabama, 809.

[3] Oliver *v.* Smith, 5 Mass. 183.

[4] Farmers' Bank *v.* Beaston, 7 Gill & Johnson, 421. See Torrens *v.* Hammond, 10 Federal Reporter, 900.

[5] Jones *v.* Gorham, 2 Mass. 375; Decoster *v.* Livermore, 4 Ibid. 101.

[6] Colby *v.* Coates, 6 Cushing, 558; Dewing *v.* Wentworth, 11 Ibid. 499.

reached by garnishment of the assignee;[1] and the same rule was applied to money payable to a creditor under a composition resolution.[2]

§ 512. *Disbursing Officers.* We have seen that a county treasurer could not be charged as garnishee, in respect of a sum of money due to the defendant from the county, and which it was the treasurer's duty to pay.[3] A similar case arose in Kentucky, where it was ruled, that money which a county court had ordered the sheriff to pay to the jailer of the county for his services as such, could not be attached in the hands of the sheriff.[4] And afterwards, in the same State, it was held that money in the hands of a public officer, as compensation due from the State to a public-school teacher, was not subject to attachment.[5] And in Illinois, it was decided that a treasurer of a city could not be charged as garnishee, on account of salary due from the city to an employee, though the account therefor had been audited, and the treasurer had the money in his hands to pay it;[6] and also that neither the treasurer nor the directors of a school district could be charged as garnishee on account of money due to a teacher.[7] The Supreme Court of the United States settled the same rule with regard to all governmental disbursing officers. The U. S. frigate Constitution returned from a cruise, and several writs of attachment were issued by a justice of the peace, against seamen of the frigate, under which the purser of the ship was garnished. The purser admitted before the justice having money in his hands due to the defendants, but contended that he was not amenable to the process. Judgment was, however, given against him, and, on appeal to the Superior Court of the county, was affirmed. The case went thence to the Supreme Court of the United States, which tribunal reversed the judgment, and in doing so used the following language: "The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert

[1] *In re* Bridgman, 2 Nat. Bankruptcy Register, 252; *In re* Cunningham, 19 Ibid. 276; *In re* Chisolm, 4 Federal Reporter, 526.

[2] *In re* Kohlsaat, 18 Nat. Bankruptcy Register, 570.

[3] *Ante*, § 493.

[4] Webb *v.* McCauley, 4 Bush, 8.

[5] Allen *v.* Russell, 78 Kentucky, 105.

[6] Triebel *v.* Colburn, 64 Illinois, 376; Smith *v.* Woolsey, 22 Illinois Appellate, 185.

[7] Millison *v.* Fisk, 43 Illinois, 112; Bivens *v.* Harper, 59 Ibid. 21.

the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might prove fatal to the public service. The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seaman." [1]

§ 513. But, where the garnishee, though acting under public authority, is not a public officer, but merely an agent for a particular purpose, a distinction has been made. Thus, where a town in New Hampshire (in pursuance of a law authorizing the several towns to make a disposition of the public money deposited with them, in such manner as each town should by major vote determine) voted to distribute it "to the inhabitants of the town *per capita*," according to a census to be taken, and appointed an agent to make the distribution, the agent was charged as garnishee of one of the inhabitants in respect of his distributive share.[2]

§ 514. The position taken by the Supreme Court of the United States, that the money, while in the hands of the disbursing officer, though delivered to him for the purpose of being paid to the defendant, is still the money of the government, applies as well to all cases where an agent has, without any privity between him and the defendant, received from his principal money to be paid to the defendant, but which he has not yet paid, or agreed with the defendant to pay to him. There, any attempt, in a

[1] Buchanan *v.* Alexander, 4 Howard Sup. Ct. 20. See Averill *v.* Tucker, 2 Cranch C. C. 544; Clark *v.* Great Barrington, 11 Pick. 260; Mechanics and Traders' Bank *v.* Hodge, 3 Robinson (La.), 373; 5 Opinions of U. S. Attorneys-General, 759; 10 Ibid. 120.

[2] Wendell *v.* Pierce, 13 New Hamp. 502.

proceeding against the party to whom the money is to be paid, to reach it by garnishment of the agent, will be unavailing; for he is not the debtor of the defendant, nor is the money in his hands the defendant's, but the principal's. The only way to reach it is by garnishment of the principal.[1] The case is different, however, where the money is collected for the defendant by *his* agent. There, the agent is in direct privity with the defendant, and the money in his hands is the defendant's, and he may be charged as garnishee in respect thereof.[2]

§ 515. *Attorneys-at-Law.* It seems to be generally conceded that persons practising as attorneys-at-law, and holding money of their clients, are not protected by their legal capacity from garnishment, but are considered liable in respect of money so held by them, even though their clients could maintain no action against them for the money until the payment of it should have been demanded.[3] A statute which declared that no person should be charged as garnishee "for any funds held by him in the capacity of clerk, cashier, or other employee of the defendant, and which have been received in the ordinary course of such employment," was held not to embrace attorneys-at-law.[4]

§ 516. *Municipal Corporations.* The liability of these bodies to garnishment has been differently regarded in different States. In New Hampshire, under a statute extending the operation of an attachment to "any corporation possessed of any money," &c., of the debtor, it was held that a town might be garnished.[5] In Connecticut, where the statute provides that "debts due from any person to a debtor," may be attached, the same view was entertained as to the same description of corporation;[6] though in that State it had been previously decided that a county could not be charged as garnishee.[7] This decision, however, was stated to have rested on the position that a county could not contract a debt for which an action would lie against it, and was

[1] Neuer *v.* O'Fallon, 18 Missouri, 277; Briggs *v.* Block, Ibid. 281; Barnard *v.* Graves, 16 Pick. 41; Huntley *v.* Stone, 4 Wisconsin, 91. See Casey *v.* Davis, 100 Mass. 124.

[2] Kennedy *v.* Aldridge, 5 B. Monroe, 141.

[3] *Ante*, § 464; Staples *v.* Staples, 4 Maine, 532; Woodbridge *v.* Morse, 5 New Hamp. 519; Coburn *v.* Ansart, 8 Mass. 319; Thayer *v.* Sherman, 12 Ibid. 441; Riley *v.* Hirst, 2 Penn. State, 346; Mann *v.* Buford, 3 Alabama, 312; Tucker *v.* Butts, 6 Georgia, 580.

[4] Narramore *v.* Clark, 63 New Hamp. 166.

[5] Whidden *v.* Drake, 5 New Hamp. 13.

[6] Bray *v.* Wallingford, 20 Conn. 416.

[7] Ward *v.* Hartford, 12 Conn. 404.

held not to be inconsistent with the views which controlled the court in sustaining the garnishment of a town.[1] In the same State it was held, that a school district might be charged as garnishee on account of salary due to a teacher.[2] In Massachusetts, under a statute providing that "any person or corporation may be summoned as trustee of the defendant," it was held, that a county might be garnished in respect of compensation due to a messenger in charge of its court-house, under appointment of the county commissioners, at a fixed salary; the compensation being due by contract, and the law of that State declaring that each county "shall continue a body politic and corporate for the following purposes: to sue and be sued, . . . and to make necessary contracts, and do necessary acts in relation to the property and concerns of the county."[3] In Iowa, an incorporated city was charged as garnishee, for money due to a defendant for public work done by him for the city;[4] but, after this, the Code of that State was amended so as to provide that "a municipal corporation shall not be garnished." Notwithstanding this provision, an attempt was made to garnish a township, on the ground that the prohibition was not intended to exempt such corporations from garnishment in all cases, but only to an extent sufficient to protect them against embarrassment in the execution of their political, civil, or corporate duties; but the court rejected this construction.[5] In Texas, a city was charged as garnishee in respect of a balance due from it to a contractor, for building a city-hall and market-house for the city.[6] In Rhode Island, under a statute authorizing all corporations, unless otherwise provided, to sue and be sued, and be garnished, a city was charged as garnishee on account of money due from it to a member of its police force.[7] In Ohio the garnishment of a city, on account of the salary due one of its officers, was sustained.[8]

[1] Bray *v.* Wallingford, 20 Conn. 416.

[2] Seymour *v.* School District, 53 Conn. 502.

[3] Adams *v.* Tyler, 121 Mass. 380.

[4] Wales *v.* Muscatine, 4 Iowa, 302. In Kentucky, in a proceeding in chancery in favor of a judgment creditor, who could not make his judgment by execution, it was held, that a sum due from a city to one of its officers might be decreed to be paid to the creditor, where the amount had, by the city authorities, been ordered to be paid to the officer, and was, when the bill was filed, subject immediately to his demand. Speed *v.* Brown, 10 B. Monroe, 108. And in Missouri, a bill in equity was sustained against an absconded debtor, and money in a city treasury was subjected to the payment of his debt; though in the attachment law the garnishment of a municipal corporation was expressly prohibited. Pendleton *v.* Perkins, 49 Missouri, 565.

[5] Jenks *v.* Osceola Township, 45 Iowa, 554.

[6] Laredo *v.* Nalle, 65 Texas, 359.

[7] Wilson *v.* Lewis, 10 Rhode Island, 285.

[8] Newark *v.* Funk, 15 Ohio State, 462.

In Vermont, on the contrary, it was held, that a town was not subject to garnishment;[1] in Pennsylvania, Maryland, Georgia, Alabama, Tennessee, Missouri, Wisconsin, Minnesota, Nebraska, Illinois, and Kansas, that a city could not be charged as garnishee;[2] in Pennsylvania, that a borough could not be;[3] in Minnesota, Arkansas, Colorado, Indiana, Nebraska, Pennsylvania, and Georgia, that a county cannot be garnished;[4] in Alabama and Pennsylvania, that incorporated commissioners of public schools were a public or municipal corporation, and could not be garnished;[5] and in Georgia that the board of education of a city could not be charged as garnishee on account of salary due to a teacher in their employ;[6] nor on account of money due to one for work done on a municipal school-house;[7] and in the District of Columbia, that the District cannot be charged as garnishee of one of its officers on account of salary due him.[8] Thus the question stands, so far as the adjudications are concerned. The argument in favor of holding such bodies as garnishees is derived from the policy of the law which subjects all of a debtor's property to the payment of his debts; while the adverse argument is based on the inconvenience and impolicy of interfering with the operations of municipal bodies, by drawing them into controversies in which they have no concern, and diverting the public moneys from the channel in which by the acts or ordinances of the corporation they are required to flow. The weight of authority is manifestly against the proceeding, so far as inferior municipal organizations are concerned.

In this connection may be mentioned a case which arose in

[1] Bradley *v.* Richmond, 6 Vermont, 121.

[2] Erie *v.* Knapp, 29 Penn. State, 173; Greer *v.* Rowley, 1 Pittsburgh, 1; Baltimore *v.* Root, 8 Maryland, 95; McClellan *v.* Young, 54 Georgia, 399; Mobile *v.* Rowland, 26 Alabama, 498; Parsons *v.* McGavock, 2 Tennessee Ch'y, 581; Memphis *v.* Laski, 9 Heiskell, 511; Hawthorn *v.* St. Louis, 11 Missouri, 59; Fortune *v.* St. Louis, 23 Ibid. 239; Burnham *v.* Fond du Lac, 15 Wisconsin, 193; Buffham *v.* Racine, 26 Ibid. 449; Merrell *v.* Campbell, 49 Ibid. 535; Merwin *v.* Chicago, 45 Illinois, 133; People *v.* Omaha, 2 Nebraska, 166; Switzer *v.* Wellington, 40 Kansas, 250; National Bank *v.* Ottawa, 43 Ibid. 294; Roeller *v.* Ames, 33 Minnesota, 132.

[3] Van Volkenburgh *v.* Earley, 1 Luzerne Legal Register, 257; 1 Chester County, 100.

[4] McDougal *v.* Hennepin County, 4 Minnesota, 184; Boone County *v.* Keck, 31 Arkansas, 387; Commissioners *v.* Bond, 3 Colorado, 411; Wallace *v.* Lawyer, 54 Indiana, 501; State *v.* Eberly, 12 Nebraska, 616; Pettebone *v.* Beardslee, 1 Luzerne Legal Register, 180; Dotterer *v.* Bowe, 84 Georgia, 769.

[5] Clark *v.* Mobile School Com'rs, 36 Alabama, 621; Taylor *v.* Knipe, 2 Pearson, 151.

[6] Hightower *v.* Slaton, 54 Georgia, 108.

[7] Born *v.* Williams, 81 Georgia, 796.

[8] Derr *v.* Lubey, 1 MacArthur, 187; Pottier & S. Man. Co. *v.* Taylor, 3 Ibid. 4; Brown *v.* Finley, Ibid. 77.

Louisiana, where it was attempted to subject to attachment taxes due from individuals to a municipal corporation. On high principles of public policy, it was, in a learned and elaborate opinion, held that the proceeding was unauthorized and inadmissible.[1] And it was so ruled in Tennessee, where the taxes were in the hands of the collector.[2] And so in Alabama, where a note had been given to the city of Mobile for taxes, and a judgment had been recovered on the note; after which the judgment debtor was garnished.[3]

§ 516 *a*. Every consideration adverse to subjecting a municipal corporation to garnishment, operates with greatly increased force against the garnishment of one of the United States. Of course, no State can be sued without its own consent, signified by its own statute law.[4] As we have seen,[5] garnishment is a suit. Therefore a State cannot be garnished without its own consent, so signified. This consent is not signified by the insertion in the State's constitution of a requirement upon the legislature to direct, by law, in what courts and in what manner suits might be commenced against the State; but such law must be enacted. And even where a State has provided by law for itself being sued, it cannot be charged as garnishee of one of its officers, in respect of the salary due him.[6] And this was so held in Georgia, as to the superintendent of a railroad which was owned entirely by the State; notwithstanding the legislature had by law authorized suits for damages to be instituted against the road, and prescribed how process should be served upon it.[7] And parties will not be allowed to evade the inhibition of suing a State, by ignoring the State in their suit, and proceeding directly against the public officer having the custody of the money sought to be reached.[8] Thus it was attempted in Tennessee to reach the salary of the State Treasurer, by garnishment in chancery of the State Comptroller, whose official duty it was to issue his warrant for the salary;[9] and to reach the

[1] Egerton *v.* Third Municipality, 1 Louisiana Annual, 435.

[2] Moore *v.* Chattanooga, 8 Heiskell, 850.

[3] Underhill *v.* Calhoun, 63 Alabama, 216, overruling Smoot *v.* Hart, 33 Alabama, 69.

[4] Briscoe *v.* Bank, 11 Peters, 259; Beers *v.* Arkansas, 20 Howard, Sup. Ct. 527.

[5] *Ante*, § 452.

[6] McMeekin *v.* State, 9 Arkansas, 553.

[7] Dobbins *v.* O. & A. R. R. Co., 37 Georgia, 240.

[8] Tracy *v.* Hornbuckle, 8 Bush, 336; Dewey *v.* Garvey, 130 Mass. 86.

[9] Bank of Tennessee *v.* Dibrell, 3 Sneed, 379.

salary of a deputy sheriff, by garnishment of the sheriff;[1] and in Kentucky, to reach the salary due from the State to a public-school teacher, by garnishment of the school commissioner, whose duty it was to pay the teacher;[2] and it was held that such proceedings were not admissible. And the same view was taken in Virginia and Tennessee, when it was sought, in the former, by garnishment of the State Treasurer, and in the latter the State Comptroller, to subject to attachment certain bonds deposited with the State by a foreign insurance company, to enable it to do business there;[3] and in Kentucky and Louisiana, when it was attempted, by garnishing the State Auditor and Treasurer, to attach certain money ordered by the legislature to be paid to an individual.[4] Clearly, then, the absolute immunity of a State from garnishment, direct or indirect, unless with its own consent, expressed by law, must be considered as completely established. This doctrine was applied in Georgia, in a case where it was sought, through process issued out of a court of that State, while in insurrection against the United States, to charge an agent of the Confederate States, in garnishment, as a debtor of the Bank of Louisiana, on the ground that he had in his possession a certain amount of gold coin, which that bank, in order to save it from capture by the United States, had sent from New Orleans to Georgia, where it was seized by the Confederate authorities, and by them placed in the garnishee's hands, as agent. As those authorities were a *de facto* government, though illegal, it was held, that the rule applied, and that the agent could not be charged in respect of the gold coin which was, when he was garnished, in his hands.[5]

§ 516 *b*. Though a municipal corporation be, by express law, exempt from garnishment, it may waive the exemption, and submit itself to liability as garnishee. And where it appears and answers without claiming the exemption, and at the trial of the question of its indebtedness to the defendant, it raises, for the first time, the question of its exemption, it will be held to be estopped from that defence.[6] But unless it appear and waive the

[1] Oliver *v.* Athey, 11 Lea, 149.

[2] Tracy *v.* Hornbuckle, 8 Bush, 336.

[3] Rollo *v.* Andes Ins. Co., 23 Grattan, 509; Pennebaker *v.* Tomlinson, 1 Tennessee Ch'y, 111. See Providence & S. S. Co. *v.* Virginia F. & M. Ins. Co., 20 Blatchford, 405; 11 Federal Reporter, 284.

[4] Divine *v.* Harvey, 7 Monroe, 439; Wild *v.* Ferguson, 23 Louisiana Annual, 752. See Spalding *v.* Imlay, 1 Root, 551.

[5] Wilson *v.* Bank of Louisiana, 55 Georgia, 98.

[6] Clapp *v.* Davis, 25 Iowa, 315.

exemption, no judgment can be given against it. Thus, where the attempt was made to garnish a county, and the county clerk answered the interrogatories, but no appearance was entered on behalf of the county, the judgment entered against it was held erroneous.[1]

[1] Commissioners *v.* Bond, 3 Colorado, 411.

CHAPTER XXIII.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY PREVIOUS CONTRACTS TOUCHING THE DEFENDANT'S PROPERTY IN HIS HANDS.

§ 517. THE liability of a garnishee in respect of property of a defendant in his hands, is to be determined ordinarily by his accountability to the defendant on account of the property. If, by any pre-existing *bona fide* contract, that accountability have been removed, or modified, it follows that the garnishee's liability is correspondingly affected. For it is well settled that garnishment cannot have the effect of changing the nature of a contract between the garnishee and the defendant, or of preventing the garnishee from performing a contract with a third person. Any other doctrine would lead to mischievous results.[1]

Therefore, where goods were shipped by the defendant to the garnishee, and a bill of exchange was drawn on the garnishee, which, before the goods were received, was presented, and he refused to accept it, and it was returned to the drawers; and soon afterwards the goods arrived, and the garnishee called on

[1] The doctrine thus stated was cited, in terms, and adopted by the Court of Appeals of Maryland, in Baltimore & Ohio R. R. Co. *v.* Wheeler, 18 Maryland, 372, where it was attempted to charge that company as garnishee, in respect of moneys received by it on account of the Central Ohio Railroad Company. The roads of these two companies terminated opposite to each other on the banks of the Ohio River, and an arrangement existed between the two companies for "through" transportation of goods and passengers, by the transfer thereof from one road to the other; each company receiving the fare or toll due for the other over both roads. In this way there were mutual accounts to be settled between the companies, for the receipts of each on the other's behalf; which were settled monthly, the balances being always in favor of the Baltimore & Ohio Company. The court held, that under such circumstances, moneys received by that company for the other were not subject to attachment, unless, upon a settlement of accounts between them, there should be found a balance in favor of the latter; and while the arrangement existed between them, as stated, it could not be broken up by an intervening attachment. The same doctrine, in effect, was previously enforced by the same court, in Poe *v.* St. Mary's College, 4 Gill, 499. See Troxall *v.* Applegarth, 24 Maryland, 163; Harris *v.* Phœnix Ins. Co., 35 Conn. 310; Chapin *v.* Jackson, 45 Indiana, 153; O'Brien *v.* Collins, 124 Mass. 98; Wart *v.* Mann, Ibid. 586; Clinton Nat. Bank *v.* Studemann, 74 Iowa, 104; Mensing *v.* Engelke, 67 Texas, 532.

the persons who had presented the bill to him, and told them if they would get the bill back he would pay it; and after this promise he was summoned as garnishee of the shippers of the goods, and in his answer admitted the possession of the defendant's goods, but set up his promise to pay the bill; the promise was held to be binding on him, and to give him a lien on the goods, in virtue of which he was entitled to retain them for his indemnity.[1] So, where the garnishee had goods of the defendant in his hands on consignment, and, at the defendant's request, agreed to pay to a third person the amount of a bill of exchange of the defendant which had been protested, and which that third person had accepted for the honor of one of the indorsers thereon; and after making this agreement he was garnished; it was held, that his agreement was binding on him, and that he was entitled to retain out of the proceeds of the goods the amount of the bill which he had undertaken to pay.[2] So, where A. delivered goods to B., with directions to sell the same on his arrival in New Orleans and pay the proceeds to C., D., and E., to extinguish, as far as they would go, a debt he owed them. On his arrival in New Orleans, B. placed the goods in the hands of C., D., and E., to sell, informing them of A.'s directions, and that, in conformity thereto, he would pay over the proceeds to them; to which they assented. Before the goods were sold they were attached by a third party as the property of A.; and it was held, that they were not subject to such attachment, because the promise of B. to C., D., and E., bound him to pay the proceeds to them, and A. could not, by a change of his determination, have compelled him to pay the money to any other person.[3] So, where the garnishee had, before the garnishment, in a transaction with the defendant, purchased from him goods, under an agreement, that, in consideration of the sale of the goods to him, he would pay off a mortgage on land which the defendant had previously executed, which he did pay after the garnishment; it was decided, that as the defendant could not lawfully, by any interference, prevent the garnishee from taking up the mortgage, so neither could the plaintiff by the operation of the attachment.[4] So, where the garnishee had received for the defendant an order on a town treasury for a certain sum, having previous to its receipt agreed with the defendant and a

[1] Grant *v.* Shaw, 16 Mass. 341.
[2] Curtis *v.* Norris, 8 Pick. 280.
[3] Armor *v.* Cockburn, 4 Martin, N. S. 667; Cutters *v.* Baker, 2 Louisiana Annual, 272; Oliver *v.* Lake, 3 Ibid 78; Burnside *v.* McKinley, 12 Ibid. 507.
[4] Owen *v.* Estes, 5 Mass. 330.

third person to whom the defendant was indebted, to deliver the order, when received, to that third person, and immediately after receiving the order he was garnished; the court held, that he was bound to deliver it according to his promise, and that the garnishment did not relieve him from that obligation.[1] So, where the garnishee had, previous to the garnishment, received from the defendant a sum of money and a note, in consideration whereof he agreed to enter a tract of land at the land-office for the defendant, and in pursuance of that agreement he had filed a land-warrant in said office, to be located for the defendant; and pending some delay in making the location, he was summoned as garnishee of the party from whom he had received the money, and thereupon desisted from any further effort to have the location made; it was held, that he could not be charged.[2] So, where a garnishee disclosed that certain creditors of the defendants having attached their property, it was, after the attachment, in pursuance of a written agreement, signed by the plaintiffs, the defendants, and the garnishee, put into the garnishee's hands to sell, and apply the proceeds to the satisfaction of the executions that might be recovered, in the order of the attachments; and after the agreement was made, but before the property came into his hands, he was garnished; and after the garnishment he received the property and disposed of it according to the agreement: the garnishee was not charged; the court considering that the garnishment "did not relieve him of his obligation to perform the contract into which he had entered. He received property of the defendants, it is true, but it was upon the express trust to dispose of it and discharge the liens upon it. He was, therefore, the agent of the creditors, to sell the property and account for the proceeds to them, with the assent of the defendants."[3] So, where a garnishee admitted the possession of a promissory note payable to the defendant, but alleged that the note had been given to him for the purpose of paying a certain judgment on which he was security for the defendant for a stay of execution; he was held not chargeable in respect to the note.[4] So, where money in the garnishee's hands was deposited with him by the defendant as security for his becoming the defendant's bail.[5] So, where the funds in the garnishee's hands were held by him under an agreement with the

[1] Mayhew *v.* Scott, 10 Pick. 54.
[2] Landie *v.* Bradford, 26 Alabama, 512.
[3] Collins *v.* Brigham, 11 New Hamp. 420.
[4] Dryden *v.* Adams, 29 Iowa, 195.
[5] Ellis *v.* Goodnow, 40 Vermont, 237.

defendant, in trust to defray the expenses of certain suits in which the latter was involved, and for which the garnishee had incurred liability to the full extent of the funds.[1] But where a garnishee resisted liability on account of money of the defendant in his hands, upon the ground that he had signed certain appeal bonds as security for the defendant, upon which he had been sued, and judgment obtained against him; but he failed to state *the time* of his signing the bonds; and it therefore did not appear but that they might have been signed *after* he was garnished; his liability was held not to be discharged.[2]

In Georgia, goods were deposited with a warehouseman, who gave a receipt therefor, engaging to deliver them to *the holder* of the receipt; and he was summoned as garnishee of the party who made the deposit; and after the garnishment he delivered the goods to a third party holding the receipt, to whom they had been sold after that event; and attempted to avoid liability as garnishee, on the ground that his receipt was a negotiable instrument, and bound him to deliver the goods to anybody to whom it might be transferred: but the court held, that the receipt was merely evidence of a contract of bailment, and not to be regarded as a negotiable security, and that the delivery of the goods by the garnishee, after the garnishment, was in his own wrong, and did not discharge him from liability.[3]

§ 517 *a*. In all cases of the descriptions referred to in the next preceding section it will, of course, be understood, that the garnishee's exemption from liability goes only to the extent of the requirements of the contract under which he holds the property. If, after meeting all those requirements, there is a balance in his hands, he may be charged in respect thereof.[4]

§ 518. In some States, statutory authority is given for the garnishment of one who is bound by contract to deliver goods or chattels to the defendant; and for the delivery of the goods, in such case, by the garnishee to the officer holding the execution, in discharge of the garnishee's liability. In Massachusetts, the statute provided that "when any person is chargeable as a trustee, by reason of any goods or chattels, other than money, which he holds, or is bound to deliver to the principal defendant, he shall deliver the same, or so much thereof as may be necessary, to the

[1] Truitt *v.* Griffin, 61 Illinois, 26.
[2] McCoy *v.* Williams, 6 Illinois (1 Gilman), 584; Crain *v.* Gould, 46 Ibid. 239.
[3] Smith *v.* Picket, 7 Georgia, 104.
[4] Davis *v.* Wilson, 52 Iowa, 187.

officer who holds the execution, and the goods shall be sold by the officer," &c.; and the statute further provided that "when any person, who is summoned as trustee, is bound by contract to deliver any specific goods to the principal defendant, at any certain time and place, he shall not be compelled, by reason of the foreign attachment, to deliver them at any other time or place." Under this statute one was garnished, who had purchased from the defendant a building, on condition, as expressed in the bill of sale, that he should "pay for the building in writing-paper at market price, delivered in New York in a reasonable time after he shall receive the order for the same." The court decided that as the goods were to be delivered to the defendant at a place out of that State, to which the officer had no authority, as officer, to go and receive the goods, the law did not apply.[1] Here, it will be observed, the garnishee had not in his hands any goods or effects of the defendant; his obligation was to deliver goods at New York, which would not become the defendant's property until delivered to him. It was, therefore, distinguishable from a subsequent case, in the same State, of the garnishment of an express company in Boston, which had in its hands *in transitu* a package of money which, as a common carrier, it had agreed to deliver to the defendant at Norwich, Connecticut. The court decided that there was no reason why a common carrier should not be subjected to liability as a garnishee, and that, as the garnishee had money of the defendant in its hands *in that State*, it was chargeable, though the money was deliverable in another State.[2] In Illinois, however, it was held, that a railroad company could not be charged as garnishee in respect of property which it was transporting, *and which was not at the time of the garnishment in the county where the writ issued;* and the court expressed grave doubts as to the liability of such a company in such a case under any circumstances.[3] In the same State, an attempt was made to charge one railroad company as garnishee of another railroad company, simply because, at the time of and after the garnishment, the former had in its possession certain box cars and flat cars belonging to the latter; which were received under running arrangements existing between the two companies as connecting lines, such as are usually adopted by connecting lines throughout the country; whereby, instead of unloading and transferring their freight from the cars of one company to the cars of the other at the

[1] Clark *v.* Brewer, 6 Grav, 320.
[2] Adams *v.* Scott, 104 Mass. 164.
[3] Illinois C. R. R. Co. *v.* Cobb, 48 Illinois 402.

point of connection, each received from the other the cars loaded with freight, and hauled them to the place of destination on its own line of road, and after discharging the freight returned the cars as soon as practicable in due course of business. The court held that the same considerations which exempt public officers and agents, in the discharge of their official duties, from garnishment, applied to common carriers, whenever garnishment would manifestly and necessarily interfere with the proper discharge, on the part of the carrier, of its public duties and functions; that in a case such as that in hand, garnishment would, beyond doubt, very seriously interfere with the transportation of freights by railroad, according to the method which experience had developed as the speediest, most economical, and best; and that such an interference was so far in conflict with sound public policy, as to warrant the court in holding that the garnished company was not chargeable as garnishee on account of its possession of the cars of the defendant company, under the circumstances of that case.[1] In Wisconsin it was held, that public policy, and the proper discharge of the duties imposed upon common carriers of personal chattels placed in their possession for carriage, required that they should not be held liable as garnishees for such chattels in their possession in actual transit, when served with garnishment process.[2]

In Georgia it was held, that the garnishment of a railroad company, chartered in Alabama, served on its local agent in Georgia, did not bind the company as to the trunk of a passenger which was, at the time of the service, *en route* with the passenger in Alabama, though it was afterwards brought into Georgia over the company's road from one point to another in that State.[3]

In Michigan it was held, that a railroad company could not be charged as garnishee of a consignee of goods which, as a common carrier, it was transporting, when it did not appear that the goods belonged to the consignee.[4]

§ 519. The contract in relation to the effects in the garnishee's hands, which will affect his liability, must not only have been entered into before the garnishment, but it must be his contract, and not that of another. Thus, A. sued B., and summoned C. as garnishee; and at the time of instituting the

[1] Michigan C. R. Co. *v.* Chicago & M. L. S. R. Co., 1 Bradwell, 399.

[2] Bates *v.* C. M. & St. P. R. Co., 60 Wisconsin, 296.

[3] Western Railroad *v.* Thornton, 60 Georgia, 300.

[4] Walker *v.* Detroit, G. H. & M. R. Co., 49 Michigan, 446.

suit, an agreement was entered into between A. and B. as to the disposition which should be made of the funds in the garnishee's hands, when recovered. C., having knowledge of the terms of that agreement, without waiting for the action of the court as to his liability as garnishee, paid over the money in his hands to the persons to whom, by the agreement, it was to be paid when recovered, and set up this payment as a discharge of his liability as a garnishee. The court held, 1. That the contract between A. and B. was executory, and to operate only when the funds should be recovered from the garnishee; and 2. That the payment was unauthorized, and could not operate to discharge the garnishee; and he was accordingly charged.[1]

§ 520. A case occurred in New Hampshire, where A. and B. made a wager on the result of a Presidential election, and deposited the money in the hands of C., to be held by him until the 4th of March, 1841, on which day, in one event of the election, both sums were to be paid to A., and in the other event, to B. In December, 1840, C. was summoned as garnishee of A., and the question was, whether the money in his hands received from A., could be subjected to the attachment, notwithstanding the agreement of wager. The court mooted, but did not deem it necessary to decide, the question of the legality of the wager; and held, that a creditor of A. could not interfere with the agreement by taking the money out of the hands of C., without A.'s consent, unless A. was in insolvent or embarrassed circumstances.[2] The doctrine here advanced can hardly be deemed consistent with public policy and sound morals. The better view is that taken in Massachusetts, holding all wagers on the result of popular elections null and void, and the money in the hands of the stake-holder a mere naked deposit, respecting which the agreement to pay it over to one, according to the result of the pending election, is inoperative and void; and that, by implication of law, the money is deposited to the use of the depositors respectively, and the share of each is subject to attachment for his debts, at any time before it is actually paid over to the winning party.[3] After it is paid over, however, the winner cannot be charged as garnishee of the loser in respect thereof.[4]

[1] Webster v. Randall, 19 Pick. 13.

[2] Clark v. Gibson, 12 New Hamp. 386. See Wimer v. Pritchartt, 16 Missouri, 252.

[3] Ball v. Gilbert, 12 Metcalf, 397. See Reynolds v. McKinney, 4 Kansas, 94.

[4] Speise v. McCoy, 6 Watts & Sargeant, 482.

CHAPTER XXIV.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY A PREVIOUS ASSIGNMENT OF THE DEFENDANT'S PROPERTY IN HIS HANDS, OR BY ITS BEING SUBJECT TO A LIEN, MORTGAGE, OR PLEDGE.

§ 521. A VERY common result of garnishment is, to bring the attachment in conflict with previous transfers of the defendant's property found in the hands of the garnishee, or with existing liens upon it. Hence have arisen numerous decisions concerning the effect of garnishment in such cases. This branch of the subject will be considered in reference to the following heads: I. Assignments, legal and equitable; II. Liens; III. Mortgages and pledges.

§ 522. I. *Assignments, legal and equitable.* Where a garnishee holds property which once belonged to the defendant, but which, before the garnishment, was, for a valuable consideration, sold to the garnishee, the attachment cannot reach it. It is no longer the property of the defendant, but of the garnishee. In any such case, if the assignment be in writing, and bear date before the attachment, and there be nothing to repel the presumption that it bears its true date, it will be effectual as against the attachment, and no evidence of its delivery, or of its receipt and acceptance by the assignee, before service of the attachment, is necessary to perfect it and give it priority.[1]

§ 523. Where a garnishee sets up title in himself to the property in his hands, it is entirely competent for the plaintiff to impeach that title, on account of fraud or other invalidating circumstance, and thereby show that the property is still liable for the defendant's debts.[2] And in Louisiana, he may call upon the assignee, whether he be the garnishee himself or a third party, to prove the consideration of the assignment. "The attaching creditor," observed the Supreme Court of that State,

[1] Sandidge *v.* Graves, 1 Patton, Jr. & Heath, 101; Wallace *v.* Maroney, 6 Mackey, 221.

[2] Cowles *v.* Coe, 21 Conn. 220; Wallace *v.* Maroney, 6 Mackey, 221.

"cannot be deprived of his lien and the right resulting from it, unless by a person who has previously acquired the property of the thing attached; and if the validity of the consideration be a necessary ingredient in the right of the assignee, the proof must come from him who alleges the assignment; for his opponents cannot prove a negative. It is clear of any doubt, that it is a *bona fide* assignment alone which can be successfully opposed to the attaching creditor; and if proof of the validity of the consideration could not be demanded, this would be tantamount to a declaration that a fraudulent or collusive assignment might have that effect."[1] And in New Hampshire, it was declared that the assignee, in order to maintain his claim against the attaching plaintiff, is bound not only to prove his claim to have been first in time, but also to have been well founded in legal right; and that the assignment was not merely formal, but *bona fide*, and upon sufficient consideration.[2] Hence, where the firm of A. & Co., being insolvent, placed a number of demands in their favor in the hands of B., for collection, in order that he might take charge of the proceeds and keep them out of the reach of attachment, and pay a dividend out of them to such of A. & Co.'s creditors as were willing to discharge them; and B. accepted an order drawn by A. & Co., requesting him to pay the money which he might collect, to the order of C., one of the firm; and B., having collected a part of the money, lent it to different persons; and was afterwards summoned as garnishee of A. & Co., at a time when he had nothing in his hands, but some of the demands left with him for collection, and the notes which he had taken; and after the garnishment, in conformity with verbal orders from C., he paid a dividend to such of the creditors of A. & Co. as were willing to give a discharge; it was held, that this was an invalid transfer of property, for a purpose not recognized by law, and void against creditors; that the order of A. & Co. to pay the proceeds of the demands to C., was the same as if it had been drawn in favor of A. & Co.; and that the fact that the proceeds had been lent out and notes taken therefor, made no difference as to the liability of B., as garnishee of A. & Co., who became liable for the money received by him immediately upon its receipt, and could not avoid that liability by lending the money out; and therefore he was charged as garnishee of A. & Co.[3] So, where A. was indebted to B., and B.

[1] Maher *v.* Brown, 2 Louisiana, 492.

[2] Giddings *v.* Coleman, 12 New Hamp. 153.

[3] Hooper *v.* Hills, 9 Pick. 435.

procured C., for an agreed premium, to guarantee the debt; and afterwards A. failed, and, at the suggestion of B., but without any knowledge of the previous guaranty, made an absolute transfer of property to C., to secure the debt to B., and after such transfer C. was garnished; the court held, that "the conveyance, instead of being made for the benefit of C., was evidently intended for the security of B. It was manifest that A., at the time of the transfer, had no knowledge that C. had guaranteed the payment; and between them therefore there was no privity, and no contract created by that guaranty. Had C. been called upon for the amount of the note by reason of his separate stipulation, the payment of that amount would not, of itself, have given him a right of action against A. It was a distinct matter, collateral to the note, between other parties, and upon another consideration. There being therefore no consideration moving from C. for the conveyance of the property in question, he holds it as the trustee of A., and must be charged as such in this action."[1] So, where a surety received from his principal property to secure him against his liabilities, and the principal afterwards made a settlement with the surety, in which he transferred to the surety his whole interest in the property for a grossly inadequate consideration, the settlement was held to be fraudulent against the creditors of the principal, and the surety was charged as garnishee of the principal, in respect of the property received by him.[2] But in this case, as well as another in Massachusetts,[3] and one in New Hampshire,[4] where property was found in the garnishee's hands, under a contract that was fraudulent as to creditors, but the garnishee, before he was summoned, had, *bona fide*, paid debts of the defendant to an amount equal to the value of the property in his hands, he was held not liable in respect of the property.

§ 524. The rule, as stated in the preceding section, applies to a case where the assignee is before the court, and in a position to assert his rights, and to be called upon to defend them. Where this is not the case, it is not admissible to charge with fraud a transaction to which he was a party. Thus, where a garnishee answered, and admitted having made a note to the defendant, which he stated was assigned to a third party before the garnishment; and the plaintiff, on a contest of the answer,

[1] Knight *v.* Gorham, 4 Maine, 492.
[2] Ripley *v.* Severance, 6 Pick. 474.
[3] Thomas *v.* Goodwin, 12 Mass. 140.
[4] Hutchins *v.* Sprague, 4 New Hamp. 469.

offered to prove that the assignment was fraudulent; it was held, that that question could not be tried in that proceeding, to which the assignee was not a party; for the judgment of the court establishing the fraud would not be conclusive upon him; and if not thus conclusive, the garnishee might be subjected to a double recovery.[1]

§ 525. In determining whether the property has in fact been assigned, the point to be ascertained is, whether the supposed assignor has so disposed of it that it is beyond his control. A mere direction from him to deliver or pay it to the supposed assignee, without the assignee's knowledge and assent, will not be considered to constitute an assignment, as against an attaching creditor of the assignor.[2] Thus, where A. sent to B. a quantity of gold-dust to be sold, and directed the proceeds to be paid to C., a creditor of A., and after the sale, and before the proceeds were paid over, B. was summoned as garnishee of A.; it was held, that C. had acquired no interest in the proceeds, but they still were the property of A.[3] So, where, upon a consignment of goods to be sold on commission, the consignees accepted an order drawn upon them by the consignor, by which they were requested to pay to his order, in thirty days, the sum of one thousand dollars, *or* what might be due after deducting all advances and expenses; and after the acceptance, but before the goods were sold, the consignees were summoned as garnishees of the consignor; it was decided that the order, not being made to a third person, could not operate as an assignment, and neither was it a negotiable security; and therefore the garnishees were charged.[4] So, where attorneys-at-law collected money in a suit in the name of A., to the use of B., and were summoned as garnishees of A., and B. disclaimed any right to the money, they were charged.[5] So, where goods were shipped by A. to B., and A. afterwards drew a draft on B., in favor of a third party, against the consignment, which draft B. refused to accept, but expressed a willingness to pay the amount of it out of the proceeds

[1] Simpson *v.* Tippin, 5 Stewart & Porter, 208.

[2] Baker *v.* Moody, 1 Alabama, 315; Clark *v.* Cilley, 36 Ibid. 652; Sterrett *v.* Miles, 37 Ibid. 472; Keithly *v.* Pitman, 40 Missouri Appeal, 596; Kelly *v.* Roberts, 40 New York, 432.

[3] Briggs *v.* Block, 18 Missouri, 281; Sproule *v.* McNulty, 7 Ibid. 62. See Brown *v.* Foster, 4 Cushing, 214; State *v.* Brownlee, 2 Speers, 519; People *v.* Johnson, 14 Illinois, 342; Dolsen *v.* Brown, 13 Louisiana Annual, 551; Robertson *v.* Scales, Ibid. 545; Connelly *v.* Harrison, 16 Ibid. 41; Hearn *v.* Foster, 21 Texas, 401; Center *v.* McQuesten, 18 Kansas, 476; Burger *v.* Burger, 135 Penn. State, 499.

[4] Cushman *v.* Haynes, 20 Pick. 132.

[5] Myatt *v.* Lockhart, 9 Alabama, 91.

of the consignment; such expression was deemed insufficient to give the holder of the draft a right to the proceeds.[1] So, where money was deposited by A. in a bank, with the express agreement between A. and the bank that the deposit was made and received to pay certain specified checks which A. had drawn or would draw; the money was considered to be A.'s, and the bank liable therefor as garnishee, until the bank had paid, or promised to pay it on the checks.[2] So, where A. shipped to B. five bales of cotton; and at the same time, being indebted to C., wrote to him, "I ship three bales of cotton for you to B.; sell when you think best, and credit my note with the amount;" it was held, that the title to the cotton had not passed out of A., and that it was attachable for his debt, by garnishment of B.[3]

§ 526. But where the appropriation of the property is made by the assignor and accepted by the assignee, the particular form in which the thing is done is of little moment, and the assignment will be sustained. Thus, certain funds were placed by A. in the hands of B., for the purpose of paying certain drafts drawn upon the fund, and the holders of the drafts knew that the fund was so placed for that purpose, and assented to it, by presenting their drafts, and receiving each a *pro rata* payment out of the fund. It was then attempted to reach the fund in the hands of B. by attachment against A.; but the court held, that it was assigned to B. for a particular purpose, and that the assent of the holders of the drafts having been given, there was an appropriation of it, which could not be changed without their consent, and that B. was not liable as garnishee of A.[4] So, where A. received a sum of money from B. to pay over to C., and afterwards saw C., and informed him of having received it, but that he did not then have it with him, but would pay it to him; to which C. assented and requested A. to hold it for him, which A. consented and promised to do; it was held, that C.'s right to the money became absolute after his conversation with A., and paramount to an attachment against B., served after that time.[5]

[1] Dolsen *v.* Brown, 13 Louisiana Annual, 551.

[2] Mayer *v.* Chattahoochee Nat. Bank, 51 Georgia, 325.

[3] Redd *v.* Burrus, 58 Georgia, 574.

[4] Dwight *v.* Bank of Michigan, 10 Metcalf, 58. See Cammack *v.* Floyd, 10 Louisiana Annual, 351; Smith *v.* Clarke, 9 Iowa, 241; Van Winkle *v.* Iowa I. & S. F. Co., 56 Ibid. 245; Mansard *v.* Daley, 114 Mass. 408.

[5] Brooks *v.* Hildreth, 22 Alabama, 469. See Burnside *v.* McKinley, 12 Louisiana Annual, 505; Simpson *v.* Bibber, 59 Maine, 196; Ray *v.* Faulkner, 73 Illinois, 469; Crownover *v.* Bamburg, 2 Bradwell, 162.

§ 527. An equitable assignment will secure the property against attachment for the debt of the assignor, though no notice be given, prior to the attachment, to the person holding the property, if it be given in time to enable him to bring it to the attention of the court before judgment is rendered against him as garnishee. Thus, A., being indebted to B., assigned to him a policy of insurance on goods at sea, which were afterwards lost. A creditor of A. garnished one of the underwriters, who had no knowledge of the assignment of the policy; and the question was whether the assignment, without notice to the underwriters, was good, so far as to vest a property in the assignee, and thus preclude an attachment; and the court considered that the assignment, though made without the knowledge or assent of the underwriter, vested an equitable right in the assignee; and the garnishee was discharged.[1] So, a judgment obtained in the name of A. to the use of B., is not attachable in a suit against A.[2] So, where one held a power of attorney authorizing him to transfer to himself, as trustee, certain shares of bank stock to pay a debt due to him as trustee, it was held to be an equitable assignment of the stock.[3]

§ 528. Much more will an assignment be effectual, where notice of it has been given to the garnishee before the attachment. Thus, where the garnishees disclosed that they had collected money for the defendant, but before its receipt, and before the garnishment, they had accepted an order drawn on them by the defendant in favor of a third person, for whatever sum they might collect; the order was held to be an assignment of the money, and the garnishees were discharged.[4] So, where a bank was garnished, in respect of certain shares of its stock, standing in the name of the defendants on its books, but which, it appeared in evidence, had, before the garnishment, been sold and transferred by the defendants in England, by delivery of the certificate, with a power of attorney authorizing the transfer of

[1] Wakefield *v.* Martin, 3 Mass. 558. See Page *v.* Crosby, 24 Pick. 211; Balderstone *v.* Manro, 2 Cranch C. C. 623; Walling *v.* Miller, 15 California, 38; Haldeman *v.* Hillsborough & Cin. R. R. Co., 2 Handy, 101; Smith *v.* Clarke, 9 Iowa, 241; Canal Co. *v.* Insurance Co., 2 Philadelphia, 354; Noble *v.* Thompson Oil Co., 79 Penn. State, 354; McGuire *v.* Pitts, 42 Iowa, 535; Dresser *v.* McCord, 96 Ill., 389; Woodward *v.* Brooks, 18 Bramwell, 150.

[2] Davis *v.* Taylor, 4 Martin, N. s. 134.

[3] Matheson *v.* Rutledge, 12 Richardson, 41.

[4] Legro *v.* Staples, 16 Maine, 252. See Adams *v.* Robinson, 1 Pick. 461; Nesmith *v.* Drum, 8 Watts & Sergeant, 9; Brazier *v.* Chappell, 2 Brevard, 107; Lamkin *v.* Phillips, 9 Porter, 98; Colt *v.* Ives, 31 Conn. 25; Dobbins *v.* Hyde, 37 Missouri, 114; Newell *v.* Blair, 7 Michigan, 103; Manning *v.* Matthews, 70 Iowa, 503.

the stock on the books of the bank, though the stock was not transferred until afterwards; the court decided that the stock was equitably transferred before the garnishment, and said: "It cannot be denied, that a mere *chose in action* equitably assigned is not subject to the operation of a foreign attachment instituted against the party whose name must necessarily be used at law for the recovery of the demand, and that an attaching creditor can stand on no better footing than his debtor."[1]

§ 529. If a creditor attach goods which appear as the property of the defendant, but wherein another person has nevertheless an interest, which he communicates to the creditor before the attachment is laid, the creditor is bound to refund to such person his proportion of the money recovered under the attachment, notwithstanding the judgment of a competent court decreed the whole to the plaintiff as the property of the defendant.[2] And where the maker of a note was charged as garnishee on account thereof, and paid the amount of it under the attachment, an assignee of the note prior to the garnishment, who was not made a party to, and had no notice of, the attachment suit, was held entitled to recover the amount of the note from the attaching creditor.[3]

§ 530. Where it is provided by law, that when a garnishee discloses an assignment of the debt to a third person, the supposed assignee may be cited to become a party to the suit, in order to test the validity of the assignment, it is the duty of the court to suspend proceedings against the garnishee, and cause notice to be given to the supposed assignee to appear and contest the right of the attaching creditor to hold the debt under the garnishment.[4] If the assignee, after being notified, fails to appear and defend his rights;[5] or if he appear and there is a trial of the supposed assignment, resulting in a judgment against him;[6] the judgment, in either case, against the garnishee will bar a subsequent action against him by the assignee.

§ 531. The rights of conflicting assignments of the same effects cannot be tried in an attachment suit. Where, therefore,

[1] United States *v.* Vaughan, 3 Binney, 394.

[2] Bank of N. America *v.* McCall, 3 Binney, 338.

[3] Garrott *v.* Jaffray, 10 Bush, 413. *Sed contra*, Gates *v.* Kerby, 13 Missouri, 157; Funkhouser *v.* Howe, 24 Ibid. 44; Dickey *v.* Fox, Ibid. 217.

[4] Clark *v.* Few, 62 Alabama, 243.

[5] Stevens *v.* Dillman, 86 Illinois, 233.

[6] Fisk *v.* Weston, 5 Maine, 410; Born *v.* Staaden, 24 Illinois, 320.

it appeared that there was an assignment to one person before the attachment, and to another afterward, it was held, that the conflict beween the two assignments was an appropriate matter for the determination of a court of equity; but that, so far as the attachment was concerned, their existence only showed more fully that the defendant had no attachable interest, and the garnishee was discharged.[1]

§ 532. II. *Liens.* In its most extensive signification the term *lien* includes every case in which real or personal property is charged with the payment of any debt or duty; every such charge being denominated a lien on the property. In a more limited sense, it is defined to be a right of detaining the property of another until some claim be satisfied.[2] The law recognizes two species of lien, particular liens and general liens. Particular liens are, where a person claims a right to retain goods, in respect of labor or money expended on such goods; and these liens are favored in law. General liens are claimed in respect of a general balance of account; and are founded on express agreement, or are raised by implication of law, from the usage of trade, or from the course of dealing between the parties, whence it may be inferred that the contract in question was made with reference to their usual course of dealing.[3]

§ 533. If a garnishee having property of the defendant in his possession, has a valid lien thereon, as the defendant could not take the property from him without discharging the lien, so neither can a creditor take it by garnishment.[4] Therefore, where a garnishee to whom goods were consigned, had, before the garnishment, verbally agreed to pay to a third person, out of the proceeds of the consignment, a bill of exchange drawn by the consignor on the garnishee, it was held, that the promise was binding on him, and gave him a lien on the goods, which entitled him to retain them for his indemnity.[5]

§ 534. In South Carolina, before the enactment of the statute to be referred to in the next section, it was held, that to enable a garnishee to retain goods of the defendant in his hands, it is

[1] Shattuck *v.* Smith, 16 Vermont, 132.
[2] Bouvier's Law Dictionary.
[3] 2 Wheaton's Selwyn, 4th Am. Ed. 537.
[4] Nathan *v.* Giles, 5 Taunton, 558; Kirkman *v.* Hamilton, 9 Martin, 297; Nolen *v.* Crook, 5 Humphreys, 312; Smith *v.* Clarke, 9 Iowa, 241.
[5] Grant *v.* Shaw, 16 Mass. 341; Curtis *v.* Norris, 8 Pick. 280.

not necessary that he should prove himself to be a creditor entitled to bring an action; but it is enough if he establish a lien, even for outstanding liabilities incurred for the defendant. And it was there decided, that where an agent in that State, for a commission, negotiates exchanges for a house in New York, buys bills on Europe for them, and, to raise funds for that purpose, draws and sells bills upon them at home for corresponding amounts; some of which they accept, and others they do not, and the bills are protested; such agent has a lien on any funds or securities which come to his hands for his principal, to secure himself against his outstanding liabilities, although he have not in fact paid any of the bills. And there is no difference between bills accepted and not paid, and bills not accepted. The lien extends to all equally. Nor does it make any difference, that the funds and securities came to hand after the liability was incurred, and therefore were not looked to as an indemnity at the time.[1]

§ 535. In South Carolina, a statute provided, that if the defendant whose property is attached in the hands of a garnishee, be really and truly indebted to the garnishee, then the garnishee, if his possession of the defendant's property was obtained legally and *bona fide* without any tortious act, shall be first allowed his own debt. In such case, the garnishee is there styled "a creditor in possession;" and the effect of the statute is simply to give him a lien on the property in his hands for *any* debt due from the defendant to him, whether, by the general principles of law, he would have such lien or not. But the garnishee's claim must be a debt, not a mere liability, in virtue of which he may or may not be eventually subjected to loss. Therefore, it was held, that a surety, not having paid the debt of the principal, is not entitled, when summoned as garnishee of the principal, to hold the effects in his hands as a creditor in possession.[2] Under this statute, this case arose. A. sent an order to B. to purchase on his account a quantity of cotton, which B. purchased and forwarded; the last of it being sent on the 3d of September. On the 4th, 7th, and 8th of September, B. drew bills on A., payable on the 25th of November, which were accepted, but were protested for non-payment. On the 27th and 28th of November, C. paid the bills for B.'s honor, and claimed and received reimbursement from B. On the 5th of December, a ship of A.'s, which had previously come consigned to B., was attached by a

[1] Bank *v.* Levy, 1 McMullan, 431. [2] Yongue *v.* Linton, 6 Richardson, 275.

creditor of A., and B. claimed to hold the ship as a creditor in possession. Two questions were raised: 1. Whether, when the attachment was levied, A. was indebted to B.; and, 2. Whether B. had then, as consignee of the ship, such possession of her as to entitle him to the benefit of the statute. Both questions were decided in the affirmative; and the attachment declared inoperative as against B.[1]

§ 536. Whether the garnishee has a right to hold the defendant's property against an attachment, must depend on the actual existence of a lien, as contradistinguished from mere possession. If he have no lien, legal or equitable, nor any right as against the owner, by contract, by custom, or otherwise, to hold the property in security of some debt or claim of his own; if he has a mere naked possession of the property without any special property or lien; if the defendant is the owner, and has a present right of possession, so that he might lawfully take it out of the custody of the garnishee; the garnishee cannot claim to satisfy his debt out of it before the attachment can reach it;[2] but must attach it, as any other creditor, for his debt.[3]

§ 537. Where a garnishee has in his possession real and personal property of the defendant, both of which are liable to him for a debt of the defendant, he cannot, in the absence of fraud, be subjected as garnishee in respect of the personalty, and thereby compelled to look to the real estate alone for his security.[4]

§ 537 *a*. A money judgment against the garnishee for the value of the property in his hands, on which he has a valid lien, is erroneous; it should be a conditional judgment, to be discharged by delivery of the property to the sheriff, upon provision being made for the payment of his lien.[5]

§ 538. III. *Mortgages and Pledges.* A pledge or pawn is a bailment of personal property, as a security for some debt or engagement. A mortgage of goods is distinguishable from a mere pawn. By a grant or conveyance of goods in gage or mortgage, the whole legal title passes conditionally to the mortgagee; and if the goods are not redeemed at the time stipulated, the title

[1] Mitchell *v.* Byrne, 6 Richardson, 171.
[2] Allen *v.* Hall, 5 Metcalf, 263.
[3] Allen *v.* Megguire, 15 Mass. 490; Bailey *v.* Ross, 20 New Hamp. 302.
[4] Scofield *v.* Sanders, 25 Vermont, 181; Goddard *v.* Hapgood, Ibid. 351.
[5] Hawthorn *v* Unthank, 52 Iowa, 507.

becomes absolute at law, although equity will interfere to compel a redemption. But in a pledge, a special property only passes to the pledgee, the general property remaining in the pledger. There is also another distinction. In the case of a pledge of personal property, the right of the pledgee is not consummated, except by possession; and ordinarily when that possession is relinquished, the right of the pledgee is extinguished or waived. But in the case of a mortgage of personal property, the right of property passes by the conveyance to the pledgee, and possession is not, or may not be essential to create, or to support the title.[1]

§ 539. The principle has been before laid down, that a garnishee can be rendered liable in respect of the defendant's property in his hands, only when the property is capable of being seized and sold under execution.[2] On general principles, and in the absence of statutory interposition, an execution cannot be levied on a mere equity. The interest of a pledger or mortgagor in personalty pledged or mortgaged, is the mere equitable right of redemption, by paying the debt, or performing the engagement, for the payment or performance of which the property was pledged or mortgaged. Hence, personalty so situated is not subject to sale under execution, and, therefore, not attachable.[3] It follows that the pledgee or mortgagee of personalty cannot be held as garnishee of the pledger or mortgagor, while the property is the subject of the pledge or mortgage;[4] nor can the attorney of the pledgee or mortgagee, in whose hands the latter may have left money derived from the sale of the mortgaged property.[5] Especially not where the mortgagee is not in possession of the property; and he is not under obligation to take possession of it, so as to make a fund capable of being attached by a creditor of the mortgagor.[6] Nor, if there be no agreement that he shall sell

[1] Story on Bailments, 4th Ed. §§ 286, 287.

[2] *Ante*, §§ 463, 480.

[3] Badlam *v.* Tucker, 1 Pick. 389; Andrews *v.* Ludlow, 5 Ibid. 28; Holbrook *v.* Baker, 5 Maine, 309; Haven *v.* Low, 2 New Hamp. 13; Picquet *v.* Swan, 4 Mason, 443; Thompson *v.* Stevens, 10 Maine, 27; Sargent *v.* Carr, 12 Ibid. 396; Lyle *v.* Barker, 5 Binney, 457; Hall *v.* Page, 4 Georgia, 428.

[4] Badlam *v.* Tucker, 1 Pick. 389; Central Bank *v.* Prentice, 18 Ibid. 396; Whitney *v.* Dean, 5 New Hamp. 249; Hudson *v.* Hunt, Ibid. 538; Howard *v.* Card, 6 Maine, 353; Callender *v.* Furbish, 46 Ibid. 226; Kergin *v.* Dawson, 6 Illinois (1 Gilman), 86; Patterson *v.* Harland, 12 Arkansas, 158; Beckham *v.* Carter, 19 Missouri Appeal, 596. *Sed contra*, Carty *v.* Fenstemaker, 14 Ohio State, 457; Burnham *v.* Doolittle, 14 Nebraska, 214.

[5] Atwood *v.* Hale, 17 Missouri Appeal, 81.

[6] Curtis *v.* Raymond, 29 Iowa, 52; First National Bank *v.* Perry, Ibid. 266.

the property to pay the debt for which it is pledged or mortgaged, can he be compelled to do so;[1] but if there be such an agreement, and the property, in pursuance thereof, be sold, any surplus remaining after the payment of the debt secured may be reached by garnishment.[2] But in order to the mortgagee's immunity from liability as garnishee of the mortgagor, the mortgage must be for a debt incurred or liability encountered before the garnishment. While it is conceded that a mortgage may be valid, containing a stipulation for securing future advances and liabilities on the part of the mortgagee, yet it will secure only such as have been made or assumed before other interests have intervened. After the mortgagee has been subjected to garnishment in an action against the mortgagor, no new and independent indebtment, either by moneys advanced or liabilities assumed, will defeat the lien of the attachment, or have a priority to the same under the mortgage.[3]

§ 540. Any relinquishment, however, of a lien will open the way for the garnishment of the pledgee. Therefore, where a creditor who had property in his possession which he supposed to be pledged to him for the payment of a debt due him, was summoned as garnishee of his debtor, and afterwards caused the property to be attached by a writ in his own favor; it was held, that he had relinquished the lien he claimed to have had by the delivery of the property as a pledge, and was, therefore, subject to garnishment.[4]

[1] Badlam *v.* Tucker, 1 Pick. 389; Howard *v.* Card, 6 Maine, 353.

[2] Badlam *v.* Tucker, 1 Pick. 389. See Hawthorn *v.* Unthank, 52 Iowa, 507; Chesapeake G. Co. *v.* Sparks, 18 Federal Reporter, 281.

[3] Barnard *v.* Moore, 8 Allen, 273.

[4] Swett *v.* Brown, 5 Pick. 178.

CHAPTER XXV.

THE GARNISHEE'S LIABILITY AS A DEBTOR OF THE DEFENDANT. — GENERAL VIEWS. — DIVISION OF THE SUBJECT.

§ 541. We reach now the consideration of a garnishee's liability in respect of his indebtedness to the defendant, — a field of inquiry coextensive with that over which we have just passed, in relation to the kindred topic of his liability in regard to property of the defendant in his possession. The two subjects will be seen to have many principles in common. For instance, we have seen that, except in cases of fraudulent transfers, the garnishee's liability for the defendant's property in his possession, depends much upon whether the defendant has a right of action against him for the property.[1] So, in order to charge a garnishee as a debtor of the defendant, it is a general principle — subject, of course, to exceptions — that the defendant shall have a cause of action, present or future, against him.[2]

But a present cause of action, in the sense of a *present right to sue*, is not necessary to sustain the garnishment. Thus, as hereafter appears,[3] money due the defendant, but not payable till a future day, may be attached. And so, a person indebted to two jointly may be charged as garnishee of one of them, though that one could not maintain an action against him without joining his co-creditor.[4] So, where a savings bank was garnished, and at the time had money of the defendant on deposit, which, by the terms of its charter, could be withdrawn by him only at certain designated times, and after a week's notice, and upon the production of

[1] *Ante*, § 458.

[2] Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; White *v.* Jenkins, 16 Ibid. 62; Brigden *v.* Gill, Ibid. 522; Rundlet *v.* Jordan, 3 Maine, 47; Haven *v.* Wentworth, 2 New Hamp. 93; Adams *v.* Barrett, Ibid. 374; Piper *v.* Piper, Ibid. 439; Greenleaf *v.* Perrin, 8 Ibid. 273; Paul *v.* Paul, 10 Ibid. 117; Hutchins *v.* Hawley, 9 Vermont, 295; Hoyt *v.* Swift, 13 Ibid. 129; Walke *v.* McGehee, 11 Alabama, 273; Harrell *v.* Whitman, 19 Ibid. 135; Cook *v.* Walthall, 20 Ibid. 334; Kettle *v.* Harvey, 21 Vermont, 301; Patton *v.* Smith, 7 Iredell, 438; Lundie *v.* Bradford, 26 Alabama, 512; Hall *v.* Magee, 27 Ibid. 414; McGehee *v.* Walke, 15 Ibid. 183; Lewis *v.* Smith, 2 Cranch C. C. 571.

[3] *Post*, § 557.

[4] Whitney *v.* Munroe, 19 Maine, 42; Miller *v.* Richardson, 1 Missouri, 310.

his pass-book, or satisfactory evidence of its loss; none of which requirements had been met by the defendant before the garnishment took place, and therefore he then had no right to sue the bank; it was held, that the bank was, nevertheless, chargeable as garnishee.[1] So, where a contractor for the building of a house was, by the terms of the contract, to be paid as the work progressed, on the architect's certificates of amounts due him for work done; and the owner of the building was summoned as garnishee during the progress of the work, at a time when no such certificates were outstanding, and the contractor could not have maintained an action against him, though money was due him; it was held, that the owner could nevertheless be charged as his garnishee.[2]

§ 541 *a*. No liability can be enforced against a garnishee for a debt based upon an illegal consideration. Thus, where A., an inhabitant of Maine, was indebted to B., an inhabitant of Massachusetts, for the price of intoxicating liquors purchased from B., in the latter State, with intent to sell the same in the former, where such sale was forbidden by law; it was held, that A. could not be charged in the courts of Maine as garnishee of B., because B. could not in the courts of that State have maintained an action against him for the price.[3]

§ 542. Pending the garnishment, the rights of the defendant are excluded and extinguished, only to the extent that may be necessary for the ultimate subjection of the debt or property in the garnishee's hands to the operation of the attachment. For every purpose of making demand, or securing his claim by attachment or otherwise, the rights of the defendant remain unimpaired by the pendency of the garnishment. They subsist, however, in subordination to any lien created by that proceeding.[4] And it is his right to see that if the debt of the garnishee is to be taken from him against his will, and applied to satisfy his indebtedness to the plaintiff, it shall be done strictly in the mode provided in the statute. In such case the garnishee cannot waive any statutory requirement, so as to allow his debt to be taken in any other way.[5]

[1] Nichols *v.* Scofield, 2 Rhode Island, 123. See Clapp *v.* Hancock Bank, 1 Allen, 394.

[2] Wilcus *v.* Kling, 87 Illinois, 107.

[3] McGlinchy *v.* Winchell, 63 Maine, 31.

[4] Hicks *v.* Gleason, 20 Vermont, 139; Bank of the State of Missouri *v.* Bredow, 31 Missouri, 523. See Gause *v.* Cone, 73 Texas, 239.

[5] Nelson *v.* Sanborn, 64 New Hamp. 310; Raymond *v.* Rockland Co., 4 Conn. 401.

§ 543. By the custom of London a plaintiff may, by garnishment, attach, in his own hands, money or goods of the defendant. But can a plaintiff charge himself as garnishee, in respect of a debt due from him to the defendant, or can several plaintiffs summon one of their own number, with a view so to charge him? In Pennsylvania and Ohio it is held, that the former may be done;[1] but in New Hampshire and Rhode Island, that it cannot.[2] The question in the latter aspect came before the Supreme Court of Massachusetts, which declined expressly deciding it, because its decision was not necessary in the case, but gave a very distinct intimation in the negative; considering it a novel experiment, and quite distinguishable from the case of a plaintiff holding money or goods of the defendant, and attaching them in his own hands.[3] In Louisiana, however, it was held that it might be done;[4] and so in Vermont.[5] In Tennessee, also, where the proceeding by attachment against non-residents is in chancery, this case arose. A., B., & C., as partners, were indebted to D., by note. D. sued on the note, and obtained judgment against A. & B., but not against C., who was a non-resident; and issued execution, which was returned *nulla bona;* A. & B. being insolvent. C. held a note made to him by D. & E., which, to avoid the claims of creditors, he transferred by assignment to F., a resident, without consideration and for the benefit of C. Suit was brought on this note by F., and judgment obtained against D. & E., and all the money paid to C., except an amount equal to the claim of D. against C., on the note of A., B., & C. While matters were in this position, D. filed his bill in chancery against C. and F., to subject the indebtedness of D. & E. to C., to the payment of C.'s debt to D., and the court sustained the bill.[6]

§ 544. That which the garnishment operates upon in this class of cases is *credits.* The term *credit* in this connection, is used in the sense in which it is understood in commercial law as the correlative of *debt.* Wherever, therefore, there is a credit, in this sense, there is a debt, and without a debt there can be no credit.[7] It was at one time attempted to hold by garnishment,

[1] Coble *v.* Nonemaker, 78 Penn. State, 501; Norton *v.* Norton, 43 Ohio State, 509.

[2] Blaisdell *v.* Ladd, 14 New Hamp. 129; Hoag *v.* Hoag, 55 Ibid. 172; Knight *v.* Clyde, 12 Rhode Island, 119.

[3] Belknap *v.* Gibbens, 13 Metcalf, 471.

[4] Grayson *v.* Veeche, 12 Martin, 688; Richardson *v.* Gurney, 9 Louisiana, 285.

[5] Lyman *v.* Wood, 42 Vermont, 113.

[6] Boyd *v.* Bayless, 4 Humphreys, 336. See Arledge *v.* White, 1 Head, 241.

[7] Wentworth *v.* Whittemore, 1 Mass. 471; Wilder *v.* Bailey, 3 Ibid. 289.

not only debts due from the garnishee, but debts of others to the defendant, the evidence of which, as notes, bonds, or other *choses in action*, might be in the garnishee's hands; but as it is well settled that *choses in action* are not attachable,[1] the attempt failed, and it was held, that credits included only debts due from the garnishee to the defendant.[2]

§ 545. We have said that it is usually necessary, in order to charge a garnishee, that the defendant should have a cause of action against him. It will, of course, be understood that it is not every cause of action that will render a garnishee liable, but only one for the recovery of a debt. Indeed, the rule announced in Alabama may be considered authoritative, that no judgment can be rendered against a garnishee, when there is not a clear admission or proof of a legal debt due or to become due to the defendant;[3] a debt for which the defendant might maintain an action of debt or *indebitatus assumpsit*.[4] The following cases serve to illustrate the operation of this rule. The municipal authorities of a city adopted a resolution laying out a public way, and embracing, among other things, an order that a certain sum should be awarded and paid to A.; and it was held, that this was no debt of the city, for which A. could maintain an action, and therefore that the city could not be charged as his garnishee.[5] So, where goods were sold for cash on delivery, and after the vendor had delivered part of the articles, and had figured up the amount of the prices of the whole, and the purchaser took his wallet out of his pocket to pay for them, but before he could get the money ready to do so, he was summoned as garnishee of the vendor; it was held, that the transaction was a sale for cash; that the purchaser's failure to pay the cash entitled the vendor to reclaim the articles delivered; and he having done so, there was no debt of the purchaser to him for which the purchaser could be charged as garnishee.[6] So, where a constable sold of a

[1] *Ante*, § 481.

[2] Lupton *v.* Cutter, 8 Pick. 298.

[3] Pressnall *v.* Mabry, 3 Porter, 105; Victor *v.* Hartford Ins. Co., 33 Iowa, 210.

[4] Walke *v.* McGehee, 11 Alabama, 273; Harrell *v.* Whitman, 19 Ibid. 135; Cook *v.* Walthall, 20 Ibid. 334; Lundie *v.* Bradford, 26 Ibid. 512; Hall *v.* Magee, 27 Ibid. 414; Nesbitt *v.* Ware, 30 Ibid. 68; Powell *v.* Sammons, 31 Ibid. 552; Henderson *v.* Ala. G. L. Ins. Co., 72 Ibid. 32; Alexander *v.* Pollock, Ibid. 137; Avery *v.* Lockhard, 75 Ibid. 530. See Hassie *v.* G. I. W. U. Congregation, 35 California, 378; Caldwell *v.* Coates, 78 Penn. State, 312; Williams *v.* Gage, 49 Mississippi, 777; Webster *v.* Steele, 75 Illinois, 544; Farwell *v.* Chambers, 62 Michigan, 316; Scales *v.* Southern Hotel Co., 37 Missouri, 520; Heege *v.* Fruin, 18 Missouri Appeal, 139; Ritter *v.* Boston Ins. Co., 28 Ibid. 140.

[5] Fellows *v.* Duncan, 13 Metcalfe, 332; Geer *v.* Chapel, 11 Gray, 18.

[6] Paul *v.* Reed, 52 New Hamp. 136.

defendant's property more than sufficient to pay an execution, and took the note of the purchaser for the surplus, payable to the defendant, but without the defendant's consent, who did not receive the note; the purchaser could not be charged as garnishee of the defendant, because the relation of debtor and creditor did not exist between them.[1] So, where a clerk of a court issued an attachment, under which property of the defendant was seized and sold, and the proceeds of the sale were paid into the hands of the clerk; and it was afterwards decided that the clerk had no authority to issue the writ, and that all the proceedings under it were void; and after that decision was given, creditors caused the clerk to be garnished, to subject the proceeds of the sale in his hands to their claims; it was decided that the clerk was not a debtor of the defendant.[2] So, where M. contracted with G. to build a house, and was to receive certain sums at certain stages of the work, and the balance of the contract price at its completion; and he abandoned the work before its completion, and G. caused it to be finished; and the whole amount paid by him to M., and to others in completing the work, did not equal the contract price; and G. was summoned as garnishee of M., in order to subject him to liability for the excess of the contract price over the amounts paid by him: it was held, that M. could maintain no action against G., and therefore G. could not be charged as his garnishee.[3]

§ 545 *a*. In this connection may be considered the matter of the garnishment of stockholders in corporations, to subject them to liability on account of unpaid portions of their stock. In such cases, the stockholders are usually liable to pay to the corporation only as required so to do by the board of directors, or other governing authority of the company; and therefore, ordinarily, the rule would be recognized as correct, that the stockholder cannot be charged as garnishee of the company, on account of an unpaid portion of his stock, unless a call therefor had been lawfully made.[4] But it is equally unquestionable that, where a

[1] Turner *v.* Armstrong, 9 Yerger, 412.

[2] Lewis *v.* Dubose, 29 Alabama, 219.

[3] Carpenter *v.* Gay, 12 Rhode Island, 306. Besides the previous cases cited under this section, see, to the same effect, Grace *v.* Maxfield, 6 Humphreys, 328; Cobb *v.* Bishop, 27 Vermont, 624; Morey *v.* Sheltus, 47 Ibid. 342; Curtis *v.* Alvord, 45 Conn. 569; Balliet *v.* Brown, 103 Penn. State, 546.

[4] Bingham *v.* Rushing, 5 Alabama, 403; Teague *v.* Le Grand, 85 Ibid. 493; McKelvey *v.* Crockett, 18 Nevada, 238; Lane's Appeal, 105 Penn. State, 49; Sangamon C. M. Co. *v.* Richardson, 33 Illinois Appellate, 277; Brown *v.* Union Ins. Co., 3 Louisiana Annual, 177.

stockholder is in default for instalments of stock called, he stands in the attitude of any other debtor to the corporation, and may be garnished.[1]

The right of a creditor of the corporation to charge stockholders thereof in this way does not, however, necessarily rest solely upon the call of the directors. Their authority in the premises may be, and sometimes is, taken from them, and vested, through legal proceedings, in a court, or an officer appointed by a court; and in such case the court or officer has the right and power, if the circumstances legally require it, to make calls which will be obligatory on the stockholders; and in reference to any such calls a stockholder may be charged as garnishee of the company. Thus, where a member of a mutual fire insurance company was summoned as garnishee of the company; and it appeared that he had given to it his premium notes, to be paid in such portions and at such times as the directors might, agreeably to the act of incorporation, require; and when he was garnished he was indebted to the company for his proportionate sum necessary for the payment of losses which had occurred; but the same had not been assessed by the directors; and after the garnishment the company was dissolved by decree of court, and a receiver thereof was appointed, who ascertained and proceeded to levy an assessment on all the premium notes held by the company, to meet its outstanding liabilities at the time of the dissolution; it was held that the garnishee was liable for the amount so assessed on his notes by the receiver.[2] The following case was decided by the United States Circuit Court for the Eastern District of Pennsylvania. Creditors of a corporation holding a judgment issued an attachment execution thereon, summoning several stockholders as garnishees. The garnishees had paid in twenty *per cent* of their subscriptions, and had stipulated in the subscription contract, and in notes given in pursuance thereof, that their subscriptions should be liable to assessments by the directors to the amount of fifty *per cent* thereof only, and that dividends for profits should be credited until the subscriptions should be fully paid. No assessment had been made when the attachments issued. Subsequently the corporation was declared bankrupt, and the bankrupt court, upon the petition of the assignee, ordered the stockholders to pay to him 80 *per cent*, being the en-

[1] Hannah *v.* Moberly Bank, 67 Missouri, 678; Simpson *v.* Reynolds, 71 Ibid. 594; Cucullu *v.* Union Ins. Co., 2 Robinson (La.), 571; Faull *v.* Alaska G. & S. M. Co., 8 Sawyer, 420.

[2] Hays *v.* Lycoming F. I. Co., 99 Penn. State, 621.

tire balance of their subscriptions, subject, however, to the rights, if any, of the attaching creditors. The attaching creditors intervening to claim their judgment out of the fund realized from the garnishees under this order, it was held that the liability of the garnishees upon their subscriptions was an attachable debt; that the obligation of the stockholders to pay was not created by the order of the bankrupt court, but was founded, first, on the subscription to the stock, and secondly, on the existence of creditors and debts of the corporation requiring the payment of the subscriptions to satisfy them; and that the stipulations in the subscriptions were void as against creditors, and were not to be allowed to stand in the way of an attachment execution.[1]

§ 546. We have seen,[2] in regard to the liability of a garnishee for property of the defendant, that there must be privity of contract and of interest between him and the defendant, in order to his being charged. The same rule applies to debts. Therefore, where the agent of a foreign insurance company was garnished, and it appeared that he had signed a policy of insurance, on behalf of the company, on property of the defendant, which was afterwards destroyed by fire; it was held, that *he* could not be charged.[3] So, where a note was placed in the hands of an attorney-at-law for collection, and he extended the time of payment, and took a new obligation in his own name; and a creditor of the attorney sought to subject the debt secured by this obligation to the payment of a debt due him from the attorney; and it appeared that the latter had not taken the obligation in his own right or for his own benefit; it was held, that the attachment could not be sustained.[4] So, where certain persons signed a contract as a building committee of a religious congregation, they were decided not to be liable as garnishees of the builder, because they were mere agents.[5] So, where one purchased property at an administrator's sale, and gave his note therefor to the administrator, as such, he could not be charged as garnishee of the payee of the note, on account of the payee's individual debt; the money, though payable to him, not being due to him in his individual, but in his representative capacity.[6] So, the maker of

[1] *In re* The Glen Iron Works, 41 Legal Intelligencer, 243; 16 Philadelphia, 563.

[2] *Ante*, § 490.

[3] Wells *v.* Greene, 8 Mass. 504. See Smith *v.* Posey, 2 Hill (S. C.), 471; Lewis *v.* Smith, 2 Cranch, C. C. 571.

[4] Rodgers *v.* Hendsley, 2 Louisiana, 597. See Kaley *v.* Abbott, 14 New Hamp. 359; Leland *v.* Sabin, 7 Foster, 74; Cram *v.* Shackleton, 64 New Hamp. 44.

[5] Hewitt *v.* Wheeler, 22 Conn. 557. See *ante*, § 514.

[6] Lessing *v.* Vertrees, 32 Missouri, 431. But see Coburn *v.* Ansart, 3 Mass. 319.

a note payable to J. B., trustee, was held not chargeable as garnishee of J. B., individually.[1] So, where a county was garnished on account of money ordered to be paid by the county to the defendant for his services as a juror; it was held, that the services had not been rendered on any contract, express or implied, between him and the county, but compulsorily, and did not constitute either "goods, effects, or credits" of the defendant in the hands of the county.[2] On the same grounds it was decided that the compensation of an assessor of a town, which was fixed by law, could not be reached by garnishment.[3]

§ 547. A *legal* debt, as contradistinguished from an equitable demand, is that alone which will authorize a judgment against a garnishee; at least under any judicial organization which separates legal and equitable jurisdictions. Therefore, where it was attempted to charge a garnishee of A., by showing that the garnishee had executed a note to B., which at the time of the garnishment was in the possession of A., but there was no proof that B. had indorsed the note, or that the garnishee had promised to pay it to A.; it was held, that the court could not in this proceeding assume to settle the equitable rights of the parties to the note, and that the plaintiff could hold only such debts as the defendant could recover by action at law in his own name; that is, his legal rights as distinguished from equitable.[4] So, where a judgment was recovered by A., for the use of B., against C., it was held, that C. could not be charged as garnishee of B., because he was not legally indebted to him, and whatever equitable indebtedness there might be was not attachable.[5] So, where the garnishee's indebtedness, if it existed at all, was based on unsettled accounts between him and the defendant, as partners, he was held not chargeable.[6]

§ 548. In no case where the claim of the defendant against the garnishee rests in unliquidated damages, can the garnishee be made liable. B. & P., partners, were summoned as gar-

[1] Adams *v.* Avery, 2 Pittsburgh, 77.

[2] Williams *v.* Boardman, 9 Allen, 570. See Simons *v.* Whartenaby, 2 Penn. Law Journal R. 438; Clark *v.* Clark, 62 Maine, 255.

[3] Walker *v.* Cook, 129 Mass. 577.

[4] Harrell *v.* Whitman, 19 Alabama, 135. See Hugg *v.* Booth, 2 Iredell, 282; May *v.* Baker, 15 Illinois, 89; Barker *v.* Esty, 19 Vermont, 131; Hoyt *v.* Swift, 13 Ibid. 129.

[5] Webster *v.* Steele, 75 Illinois, 544.

[6] Ives *v.* Vanscoyoc, 81 Illinois, 120; Birtwhistle *v.* Woodward, 17 Missouri Appeal, 277; 95 Missouri, 113; Knerr *v.* Hoffman, 65 Penn. State, 126; Alter *v.* Brooke, 9 Philadelphia, 258; Laughlin *v.* Maybin, 15 Ibid. 68.

nishees of T., and it appeared that they had signed and delivered to T. a paper in the following words: "This may certify that if Mr. S. T. should wish to purchase of us tin-ware at our wholesale prices within twelve months from date, and should have O. P.'s note in his possession, we will take the same in payment." Within twelve months from the date of this instrument, T. presented to B. & P. four notes of O. P., and demanded their amount in tin-ware at wholesale prices, and B. & P. refused to comply with the demand. It was contended that on this state of facts B. & P. might be held as garnishees of T.; but the court decided that as T.'s claim was not a legal debt, but rested only in unliquidated damages, the garnishment could not be sustained.[1] So, a mere liability of the garnishee to an action on the part of the defendant for a personal injury,[2] or for negligence, fraud, slander, or assault and battery;[3] or for deceit;[4] or for the wrongful conversion of the defendant's property;[5] or for the recovery from a creditor of usurious interest paid him by the defendant;[6] or for damages caused by a wrongful attachment;[7] cannot be the foundation of a judgment against the garnishee. So, a liability of a constable to an execution creditor, for a breach of official duty in respect to the collection of the execution, cannot be attached in an action by a creditor of the person to whom the constable is so liable. The officer's liability in such case is for a specific breach of duty, a mere *tort*, and is no more subject to this process, than any other right of action in form *ex delicto*.[8] Much less can the securities in an officer's official bond, against whom an action might be maintained for his failure to pay over money collected by him on execution, be held as garnishees of the execution plaintiff.[9]

§ 549. A mere contract of indemnity, where no loss has been sustained by the party indemnified, cannot authorize the garnish-

[1] Hugg *v.* Booth, 2 Iredell, 282; Deaver *v.* Keith, 5 Ibid. 374; Leefe *v.* Walker, 18 Louisiana, 1. See Rand *v.* White Mountain R. R., 40 New Hamp. 79; McKean *v.* Turner, 45 Ibid. 203; Eastman *v.* Thayer, 60 New Hamp. 575; Burgess *v.* Capes, 32 Illinois Appellate, 372.

[2] Gamble *v.* Central R. R. & B. Co., 80 Georgia, 595.

[3] Rundlet *v.* Jordan, 3 Maine, 47; Foster *v.* Dudley, 10 Foster, 463; Lomerson *v.* Huffman, 1 Dutcher, 625; Holcomb *v.* Winchester, 52 Conn. 447.

[4] Bates *v.* Forsyth, 69 Georgia, 365.

[5] Paul *v.* Paul, 10 New Hamp. 117; Despatch Line *v.* Bellamy Man. Co., 12 Ibid. 205; Getchell *v.* Chase, 37 Ibid. 106.

[6] Boardman *v.* Roe, 13 Mass. 104; Graham *v.* Moore, 7 B. Monroe, 53; Barker *v.* Esty, 19 Vermont, 131; Fish *v.* Field, Ibid. 141; Ransom *v.* Hays, 39 Missouri, 445.

[7] Peet *v.* McDaniel, 27 Louisiana Annual, 455.

[8] Hemmenway *v.* Pratt, 23 Vermont, 332; Thayer *v.* Southwick, 8 Gray, 229.

[9] Eddy *v.* Heath's Garnishees, 31 Missouri, 141.

ment of the maker of the contract in a suit against such party. Thus, where an arrangement was made between A. & B., whereby A. was to give his notes to C. for certain goods purchased by B., and B. was to furnish A. with the money to pay the notes as they matured; and the notes were given, but before they matured, A. became insolvent, and failed to pay the notes, and afterwards B. was summoned as garnishee of A.; it was held, that his contract to indemnify A. was not, in the absence of a payment of the notes, or the sustaining of any damage by A., a ground for charging him, though it appeared that A.'s notes had been received by C. expressly in payment for the goods sold.[1] So, a life insurance company cannot be subjected to liability as garnishee of one whose life it had insured, while the insured party is living.[2] But where under a contract of indemnity a loss has occurred, and the party indemnified has a claim for such loss against him who engaged to indemnify him, the latter may be charged as his garnishee in respect of such loss, *if the contract furnish a standard by which the amount of the liability may be ascertained and fixed.* Thus, an insurance company may be so charged on account of a loss accruing under a policy of insurance issued by it; for the liability to the insured clearly exists, and the policy furnishes the required standard. This has been held, not only as to adjusted claims for loss,[3] but also as to such claims unadjusted.[4] But if the policy provide that no suit should be instituted on the policy, unless begun within one year after the loss, a garnishment of the company, to be effectual, must be begun within that period.[5]

§ 550. It may further be considered as settled, that the debt must be such as is due *in money.*[6] All debts, in the absence of

[1] Townsend *v.* Atwater, 5 Day, 298.

[2] Day *v.* New England L. I. Co., 111 Penn. State, 507.

[3] Boyle *v.* Franklin Fire Ins. Co., 7 Watts & Sergeant, 76; Franklin Fire Ins. Co. *v.* West, 8 Ibid. 350.

[4] Knox *v.* Protection Ins. Co., 9 Conn. 430; Girard Fire Ins. Co. *v.* Field, 45 Penn. State, 129; 3 Grant, 329; Northwestern Ins. Co. *v.* Atkins, 3 Bush, 328; Hanover F. I. Co. *v.* Connor, 20 Illinois Appellate, 297; Crescent Ins. Co. *v.* Moore, 63 Mississippi, 419; Ritter *v.* Boston U. Ins. Co., 28 Missouri Appeal, 140; Phœnix Ins. Co. *v.* Willis, 70 Texas, 12; Bucklin *v.* Powell, 60 New Hamp. 119. *Sed contra*, Gies *v.* Bechtner, 12 Minnesota, 279; McKean *v.* Turner, 45 New Hamp. 203; Katz *v.* Sorsby, 34 Louisiana Annual, 588. In the U. S. Circuit Court of Northern District of Illinois it was held that if, at the time of its garnishment, the insurance company had waived the execution of the proofs of loss, it could be charged as garnishee; otherwise not. Lovejoy *v.* Hartford F. I. Co., 11 Federal Reporter, 63.

[5] Ritter *v.* Boston U. Ins. Co., 28 Missouri Appeal, 140.

[6] Mims *v.* Parker, 1 Alabama, 421; Jones *v.* Crews, 64 Ibid. 368.

contrary stipulations between the parties, must be paid in money. Therefore, where the garnishee acknowledged an indebtedness to the defendant, payable in mason's work and materials, it was held, that he could not be charged.[1] So, where the garnishee had given a bond to the defendant for "1,500 acres of land warrant, and 800 and odd dollars payable in whiskey."[2] So, where the garnishee had the defendant in his employ as a laborer, under an agreement that he should be paid in orders on another.[3] So, where by the terms of a written agreement under which the garnishee's indebtedness to the defendant was payable in the garnishee's negotiable promissory notes.[4] So, where the garnishee was indebted to the defendant in a certain sum to be paid in "store accounts."[5] So, where the garnishee had given the defendant a due-bill for "$1,000 in brandy at $5 per gallon."[6] And where payment was to be made in notes of the defendant to other persons, to be procured by the garnishee, he was held not to be liable.[7] And where one gave a note to another for a sum of money, "payable in boarding the wife and child" of the payee, it was decided that he was not chargeable.[8] And so, where one gave a due-bill to another for $2,000 "payable in boarding at the St. C. Hotel, to an extent not exceeding $150 per month, to G. K. G. or to any person he may direct, at regular rates."[9] And where one gave a note payable in the notes or obligations of a certain banking company, he was held not chargeable for the amount in money, if he delivered up the notes, to be disposed of by the court.[10] And where one was bound by contract to deliver to the defendant, at a future day, a certain quantity of cotton, he was held not chargeable as garnishee.[11] In all these cases the courts proceeded upon the obvious principle, that they had no power to interfere with the contract between the defendant and the garnishee, and to make the latter pay in money, what he had agreed to pay, and the defendant had agreed to receive, in something else.[12]

Still we find in Maryland, that where a garnishee was indebted

[1] Wrigley *v.* Geyer, 4 Mass. 102.

[2] McMinn *v.* Hall, 2 Tennessee, 328. See Blackburn *v.* Davidson, 7 B. Monroe, 101; Smith *v.* Davis, 1 Wisconsin, 447.

[3] Willard *v.* Butler, 14 Pick. 550.

[4] Fuller *v.* O'Brien, 121 Mass. 422.

[5] Smith *v.* Chapman, 6 Porter, 365. See Blair *v.* Rhodes, 5 Alabama, 648.

[6] Weil *v.* Tyler, 38 Missouri, 545; 43 Ibid. 581.

[7] Mims *v.* Parker, 1 Alabama, 421.

[8] Aldrich *v.* Brooks, 5 Foster, 241.

[9] Peebles *v.* Meeds, 96 Penn. State, 150.

[10] Marshall *v.* Grand Gulf R. R. & Banking Co., 5 Louisiana Annual, 360. See Jennings *v.* Summers, 7 Howard (Mi.), 453.

[11] Jones *v.* Crews, 64 Alabama, 368.

[12] Bartlett *v.* Wood, 32 Vermont, 372. See Cherry *v.* Hooper, 7 Jones, 82.

to the defendant in a sum of money, payable, by express agreement, in work and labor, he was charged.[1] And in Massachusetts, it has been decided that the maker of a note payable in *horses*,[2] or in *goods*,[3] could be held as garnishee. This unusual decision, however, rests upon an express statutory provision, authorizing one who was, when served with process, "bound to deliver to the defendant, at a then future day, any specific article or articles whatsoever other than money," to be declared garnishee of the defendant, and permitting him to deliver the specific articles to the sheriff, when execution should be issued against the defendant. And in Iowa it was held, that judgment might be rendered against a garnishee on account of a debt payable "in merchandise or trade;" but that the judgment should be a conditional one, for the amount of the garnishee's debt, but to be discharged in merchandise, at a fair value, to be placed at the disposal of the sheriff; on failure whereof the judgment, on motion, to become absolute, for which a general execution could issue.[4]

§ 551. The debt from the garnishee to the defendant, in respect of which it is sought to charge the former, must moreover be absolutely payable, at present or in future, and not dependent on any contingency. If the contract between the parties be of such a nature that it is uncertain and contingent whether anything will ever be due in virtue of it, it will not give rise to such a credit as may be attached; for that cannot properly be called a debt, which is not certainly and at all events payable, either at the present or some future period.[5] Therefore, where an attempt was made to attach by garnishment of a ship-owner, the wages of a sailor employed on his ship, then at sea, and which had not arrived at any port of unlading, as it was uncertain whether the ship ever would arrive, and, therefore, whether anything would ever become due to the defendant, it could not be called a debt, and the garnishee was therefore not chargeable;[6] and this though

[1] Louderman *v.* Wilson, 2 Harris & Johnson, 379.

[2] Comstock *v.* Farnum, 2 Mass. 96.

[3] Clark *v.* King, 2 Mass. 524.

[4] Stadler *v.* Parmlee, 14 Iowa, 175.

[5] Cushing's Trustee Process, 37; Roberts *v.* Drinkard, 3 Metcalfe (Ky.), 309; Russell *v.* Clingan, 33 Mississippi, 535; Bishop *v.* Young, 17 Wisconsin, 46; Foster *v.* Singer, 69 Ibid. 392; Edwards *v.* Roepke, 74 Ibid. 571; Wood *v.* Buxton, 108 Mass. 102; Maduel *v.* Mousseaux, 29 Louisiana Annual, 228; Reinhart *v.* Hardesty, 17 Nevada, 141; Hanover F. I. Co. *v.* Connor, 20 Illinois Appellate, 297; Beckham *v.* Carter, 19 Missouri Appeal, 596; and the subsequent cases in this section.

[6] Wentworth *v.* Whittemore, 1 Mass. 471; The Lizzie Williams, 11 Federal Reporter, 619.

the vessel had arrived just outside of the harbor to which she was bound, and was, by grounding, prevented from entering it.[1] So, where there was a contract between the shipper of a cargo and the owner of the ship, that the latter should receive a share of the profits arising on the cargo; and, before the completion of the voyage, the shipper was summoned as garnishee of the owner; the court regarding it as contingent whether the ship would successfully terminate the voyage, or if so, whether there would be any profits on the cargo, considered that there was no debt capable of attachment.[2] The cases bearing on this point are too numerous to be further stated here, but they are cited in a note.[3]

§ 552. But while the proposition that a debt not actually and at all events payable, but depending on a contingency, cannot be attached, is sufficiently simple, the application of it to particular cases which raise the question of contingent or not, is not always of easy solution. This much, however, may be considered as clear, — that the contingency must affect the property itself, or the debt which is supposed to exist, and not merely the title to the property in the possession of the trustee, or his liability on a contract which he has actually made, but the force or effect of which is in litigation. Examples showing the distinction may be taken from the cases decided. Thus, the wages of a sailor on board a vessel which has not arrived, are not liable to the process, because whether due or not depends on the arrival of the vessel.[4] So, shippers of a cargo, under contract with the owner of the ship that he shall have a share of the net profits arising on the cargo, are not liable as garnishees until the termination of the voyage, as it is altogether contingent whether

[1] Taber *v.* Nye, 12 Pick. 105. Whether the wages of a seaman, earned in the coastwise trade of the United States, can be reached by garnishment in a State court, is in controversy. In the U. S. District Court for the Southern District of New York, BENEDICT, J., in an elaborate opinion, held the negative. McCarty *v.* Steam Propeller, &c., 4 Federal Reporter, 818. The Supreme Court of Massachusetts take the opposite ground. Eddy *v.* O'Hara, 132 Mass. 56; White *v.* Dunn, 134 Ibid. 271.

[2] Davis *v.* Ham, 3 Mass. 33.

[3] Frothingham *v.* Haley, 3 Mass. 68; Hancock *v.* Colyer, 99 Ibid. 187; Willard *v.* Sheafe, 4 Ibid. 235; Wood *v.* Partridge, 11 Ibid. 488; Baltimore & Ohio R. R. Co. *v.* Gallahue, 14 Grattan, 563; Strauss *v.* Railroad Co., 7 West Virginia, 368; Grant *v.* Shaw, 16 Mass. 341; Williams *v.* Marston, 3 Pick. 65; Guild *v.* Holbrook, 11 Ibid. 101; Faulkner *v.* Waters, Ibid. 473; Tucker *v.* Clisby, 12 Ibid. 22; Rich *v.* Waters, 22 Ibid. 563; Clement *v.* Clement, 19 New Hamp. 460; Meacham *v.* McCorbitt, 2 Metcalf, 352; Sayward *v.* Drew, 6 Maine, 263; Burke *v.* Whitcomb, 13 Vermont, 421; Bates *v.* New Orleans, &c. R. R. Co., 4 Abbott Pract. 72; Martz *v.* Detroit F. & M. I. Co., 28 Michigan, 201; Dickinson *v.* Dickinson, 59 Vermont, 678; Webster Wagon Co. *v.* Peterson, 27 West Virginia, 314.

[4] Wentworth *v.* Whittemore, 1 Mass. 471.

anything will ever be due.[1] There are many other cases of a similar character, but these two are sufficiently distinct to show what is intended in the decisions by the term *contingent*, — that is, an uncertainty whether anything will ever come into the hands of the trustee, or whether he will ever be indebted; the uncertainty arising from the contract, express or implied, between the debtor and the trustee. This principle has never been applied to a case where property is actually in the possession of the garnishee claimed by the debtor, his right to it being in controversy, nor to demands against the garnishee himself in the nature of a debt due to the defendant, which, however, may be in dispute between them. In such cases the process is considered as attaching, and is postponed until a liability to the debtor is ascertained.[2]

Therefore, where the garnishee answered that he had a sum of money in his hands, the right to which was contested between the defendant and other parties, and had been submitted to referees, the court held, that here was no contingency as to the property, but merely as to the title, and that such contingency did not discharge the garnishee; and that the proceedings might be postponed until it should be ascertained to which party the money belonged.[3] So, where a garnishee had purchased certain property of the defendant, under a contract to pay for the same within a stipulated time, unless within that time he should elect to reconvey the property; and, before the expiration of the time, and before he had elected to reconvey the property, he was summoned as garnishee of the defendant; and objection was made to his being charged, on the ground that his liability depended on a contingency, which had not happened when he was garnished; it was held, that the case was not one of contingency such as to exempt the garnishee from liability.[4] So, where a contractor had done work, the payment for which was, by the terms of the contract, to be made on the estimate and certificate of an engineer; and there was nothing further to be done by the contractor to entitle him to be paid; it was held, that the fact that the engineer's estimate and certificate had yet to be made, was not a contingency which prevented the party for whom the work was done from being charged as garnishee of the contractor.[5]

[1] Davis *v.* Ham, 3 Mass. 33; Cutter *v.* Perkins, 47 Maine, 557.

[2] Thorndike *v.* DeWolf, 6 Pick. 120; Dwinel *v.* Stone, 30 Maine, 384; Downer *v.* Curtis, 25 Vermont, 650.

[3] Thorndike *v.* DeWolf, 6 Pick. 120; Weil *v.* Posten, 77 Missouri, 284.

[4] Smith *v.* Cahoon, 37 Maine, 281.

[5] Ware *v.* Gowen, 65 Maine, 534.

§ 552 *a*. In Michigan, under a statute enacted in 1879, a garnishee may be held "liable on any contingent right or claim against him in favor of the principal defendant." Under that act this case arose: C. contracted with B. and others, a building committee, to build for them a church. Payments were to be made as the work progressed, to the amount of ninety per cent of the estimates, and the balance after completion. A forfeiture was agreed upon in the event that the work was not done by the time stipulated. A creditor of C., while the work was in progress, caused the building committee to be summoned as garnishees of C. When summoned they had already made large payments to him, and insisted that nothing was then due from them to him. The garnishing plaintiff disputed this; but claimed that, whether that was so or not he had, under the provisions of the act, a right to hold the garnishees for anything that might subsequently become owing to C. for work done by him under the contract; because C.'s right was contingent on his performing his contract; and so the case was within the very words of the statute. But the court rejected this claim, and discharged the garnishee.[1]

§ 553. As the attaching plaintiff can acquire no other or greater rights against the garnishee than the defendant has, it follows that, though the garnishee be indebted to the defendant, yet if there be anything to be done by the latter as a condition precedent to his recovering his debt in an action against the garnishee, the plaintiff cannot obtain judgment against the garnishee without performing the condition. Thus, where a railroad company was summoned as garnishee of one who had contracted to do work on its road, and it appeared that the contract under which the work was done provided that the contractor should not receive the amount of the final estimate of his work, until he should release, under seal, all claims or demands upon the company arising out of the contract; and at the time of the garnishment he had not executed such a release; it was held, that the company could not be charged as garnishee.[2] So, where an executor was garnished on account of a legacy bequeathed to the defendant, which the defendant could not have recovered without giving the executor a refunding bond; the executor could not be charged as garnishee until the plaintiff indemnified him.[3] So,

[1] Webber *v.* Bolte, 51 Michigan, 113.

[2] Baltimore & Ohio R. R. Co. *v.* McCullough, 12 Grattan, 595. See Katz *v.* Sorsby, 34 Louisiana Annual, 588; Linden *v.* Murdy, 37 Kansas, 152.

[3] Ross *v.* McKinny, 2 Rawle, 227.

where a party contracted to perform a specified amount of labor, and the performance thereof was by the terms of the contract a condition precedent to the right to recover pay therefor, and he voluntarily abandoned the work before it was completed, without fault on the other side; it was held, that he was not entitled to recover a *pro rata* compensation for the amount of labor performed by him; and that the party for whom the work was done could not be charged as his garnishee in respect thereof.[1]

§ 553 *a*. It is not sufficient, to charge a garnishee, to show that he owes something to the defendant, but the amount owing must be shown; otherwise the proper foundation for a judgment against him is not laid.[2]

§ 554. The further consideration of the liability of a garnishee, in respect of indebtedness to the defendant, will be prosecuted in the succeeding chapters under the following heads: —

I. The garnishee's liability, as affected by the time when his debt to the defendant is payable.

II. As affected by his having co-debtors, and by the number of the defendants, and the number of his creditors.

III. His liability, as a party to a promissory note.

IV. His liability, as affected by pre-existing contracts with the defendant or third persons.

V. As affected by a fraudulent attempt by the defendant to defeat the payment of his debts.

VI. As affected by an equitable assignment of the debt.

VII. As affected by the commencement, pendency, and completion of legal proceedings against him, by the defendant, for the recovery of the debt.

[1] Kettle *v.* Harvey, 21 Vermont, 301. See Otis *v.* Ford, 54 Maine, 104.

[2] Marks *v.* Reinberg, 16 Louisiana Annual, 348. See Poor *v.* Colburn, 57 Penn. State, 415.

CHAPTER XXVI.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY THE TIME WHEN HIS DEBT TO THE DEFENDANT IS PAYABLE.

§ 555. THOUGH the doctrine is well settled, that where it is contingent whether the garnishee will ever owe the defendant money, he cannot be made liable, it by no means follows, that where there is a present debt, payable in the future, the same exemption exists. Where a system of credit is so extensively established as in this country, it would greatly impede the collection of debts, if no credits of a defendant could be reached but those actually due and payable at the time of the garnishment. Hence, in some States, it has been provided by express enactment for the attachment of debts not falling due until after the service of the writ; though on general principles such provision would seem to be unnecessary, since the almost uniform current of decision has been in favor of the operation of the garnishment in such cases.

§ 556. In Tennessee, it has been held that a debt not due cannot be attached. In the case in which this decision was had, it appeared that the garnishee owed the defendant money, which was not due at the time of the garnishment, but became due between that time and the filing of the answer, and was paid at maturity. The court said: "By the provisions of the act, the person is summoned to answer what he is indebted at the time of the summons. There is no equitable construction by which the court can feel authorized to go beyond the words of the act, to reach a case of indebtedness; the act has been taken with strictness."[1] This is believed to be the only State in which this position is taken, and from the report of this case we are justified in supposing that the general principles bearing on the matter were not presented by counsel, or considered by the court. The court say: "The person is summoned to answer what he is indebted at the time of the summons;" and, confounding indebtedness with time of payment, they consider that, because the debt was not actually due and payable at the time the garnishee

[1] Childress v. Dickins, 8 Yerger, 113; McMinn v. Hall, 2 Tennessee, 328.

was summoned, it was no debt. They overlook the fact that the law everywhere recognizes the existence of *debitum in præsenti solvendum in futuro*, and that one who has engaged to pay another a sum of money at a future time is as much a debtor as he whose time of payment has already passed. It is sufficient to say, that this decision is adverse to the entire adjudications elsewhere, in England and this country, and must be considered as overborne by the weight of authority, as well as by principle.

§ 557. Thus, by the custom of London, money due to a defendant from a garnishee, but not payable at the time of the garnishment, may be attached, and judgment may be rendered in respect thereof at once, but no execution shall issue till the time of payment arrives.[1] The same doctrine has been announced in Maine,[2] Massachusetts,[3] Pennsylvania,[4] Maryland,[5] North Carolina,[6] Alabama,[7] Indiana,[8] and Arkansas,[9] and may be regarded as firmly established. And where the debt exists, but the time when it may become payable depends upon a notice to be given by the defendant to the garnishee, it may be attached, though no such notice have been given.[10]

§ 558. A singular case occurred in Vermont, where one summoned as garnishee had given the defendant a promissory note, in which was embodied a clause in these words. "I am at my option about paying the principal of this note, while I pay the interest annually." The garnishee claimed that this clause exempted him from liability, under a statute which provided that one may be held liable as garnishee for "money due to the principal defendant, before it has become payable," but "shall not be compelled to pay it before the time appointed therefor by the contract." The court, however, very properly held otherwise, and charged the garnishee.[11]

§ 559. But in order to attach a debt payable *in futuro*, it must be a certain debt, which will become payable upon the lapse of time, and not a contingent liability, which may become a debt

[1] Priv. Lond. 261, 262.
[2] Sayward *v.* Drew, 6 Maine, 263.
[3] Willard *v.* Sheafe, 4 Mass. 235.
[4] Walker *v.* Gibbs, 2 Dallas, 211; 1 Yeates, 255; Fulweiler *v.* Hughes, 17 Penn. State, 440.
[5] Steuart *v.* West, 1 Harris & Johnson, 536.
[6] Peace *v.* Jones, 3 Murphey, 256.
[7] Branch Bank *v.* Poe, 1 Alabama, 396; Cottrell *v.* Varnum, 5 Ibid. 229.
[8] King *v.* Vance, 46 Indiana, 246.
[9] Dunnegan *v.* Byers, 17 Arkansas, 492.
[10] Clapp *v.* Hancock Bank, 1 Allen, 394; Nichols *v.* Scofield, 2 Rhode Island, 123.
[11] Fay *v.* Smith, 25 Vermont, 610.

or not, on the performance of other acts, or the happening of some uncertain event. Thus, where it was sought to attach the wages of an employee in a factory, and it appeared that when he became such he signed a written agreement that the company might pay his wages at such times and in such parts as it might from time to time elect; that he would continue in its employment, unless the contract should be terminated by mutual assent, until the expiration of thirty days' notice of his intention to leave; and that if he should leave without first giving and "working out" such notice, all wages should be liable to forfeiture to the company; and that this contract remained in force, and no notice had been given by the defendant of his intention to leave; it was held, that it was not a case of *debitum in præsenti solvendum in futuro;* that nothing was due to the defendant until he should give and "work out" the notice; and that it would make no difference that the wages were reckoned by the day, and that, as a matter of accommodation and favor, the practice of the company had been to make advances or payments on account at regular periods.[1] So, where one contracted to do certain work for a city, by a certain day, for which he was to receive a stipulated sum; and before the arrival of the day of completion, the city was summoned as his garnishee; it was held, that the contract was entire and not apportionable; that the city became liable for the work when it was completed, and not before; and that no debt existed at the time of the garnishment.[2] So, where the salary of a minister was payable quarterly, with an agreement that if he entered on a quarter and did not complete it, nothing should be due for such service, and the minister, in the middle of a quarter, tendered his resignation, which was accepted; and the parish afterwards voted to pay him *pro rata* for the time of his service, after the commencement of the quarter; it was held, that the parish was not liable as garnishee of the minister, on a process served after the resignation and before the passing of the vote, because when the process was served there was no debt, and the subsequent vote could not relate back, so as to make a debt at that time.[3] So, under a statute authorizing a garnishee to be charged on a "debt thereafter to become due," it was held that there must, at the time of the garnishment, be a subsisting debt payable *in futuro*, and that an indebtedness thereafter originating could not be affected by the garnishment.[4]

[1] Potter *v.* Cain, 117 Mass. 238.
[2] Coburn *v.* Hartford, 38 Conn. 290.
[3] Wyman *v.* Hichborn, 6 Cushing, 264.
[4] Thomas *v.* Gibbons, 61 Iowa, 50. See Baltimore & Ohio R. R. Co. *v.* Gallahue, 14 Grattan, 563.

CHAPTER XXVII.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY HIS HAVING CO-DEBTORS, AND BY THE NUMBER OF THE DEFENDANTS, AND THE NUMBER OF HIS CREDITORS.

§ 560. *His liability as affected by his having Co-debtors.* Where several persons are jointly and severally liable for a debt, any one of them may be garnished and subjected to a judgment for the whole amount of the debt, in the same manner that he might be sued by the defendant without his co-debtor being joined in the action.[1] But it is unadvisable in any case to garnish one of several joint and several debtors, without joining the others, if practicable; for a payment by one not garnished will certainly discharge the liability of the garnishee, whether made before or after the garnishment. Thus, where it appeared that the garnishee and another had executed a note to the defendant, promising to deliver to him at a certain time five tons of hay, and, before the note became due, one of the makers was garnished, and afterwards, when it became due, the other maker paid it, the court held this payment to be a discharge of the garnishee.[2]

§ 561. Where two or more persons are jointly liable for a debt, if part of them only are garnished, they may, in Massachusetts, take advantage of the non-joinder in abatement, but the process will not, because of the non-joinder, be considered wholly void.[3] In New Hampshire, however, where one was summoned as garnishee, and it appeared from his answer that he was not indebted to the defendant in his individual capacity, but as a partner in a firm, the other members of which were not joined with him in the writ, it was decided that, because of the non-joinder of the other partners, the garnishee could not be charged.[4]

[1] Travis *v.* Tartt, 8 Alabama, 574; Speak *v.* Kinsey, 17 Texas, 301; Macomber *v.* Wright, 35 Maine, 156.

[2] Jewett *v.* Bacon, 6 Mass. 60. See Robinson *v.* Hall, 3 Metcalf, 301; Sabin *v.* Cooper, 15 Gray, 532.

[3] Hathaway *v.* Russell, 16 Mass. 473. But in such case the garnishee must take advantage of the non-joinder in the early stage of the proceedings. After his failure to answer and the issue of a *scire facias* against him, consequent on such failure, he cannot set up this defence. Hoyt *v.* Robinson, 10 Gray, 371; Sabin *v.* Cooper, 15 Ibid 532.

[4] Rix *v.* Elliott, 1 New Hamp. 184;

And it was so held in Vermont,[1] Iowa,[2] Georgia,[3] Michigan,[4] Maryland,[5] and the District of Columbia.[6] And it was so ruled in Arkansas, in a case where, in a suit against A., the plaintiff was not allowed to allege that the garnishee and B. were indebted to the defendant, when B. had not been summoned as garnishee.[7] In Pennsylvania, however, while it is admitted that in common suits between creditors and debtors, the latter may plead in abatement that a partner was not named in the writ, yet that the reason of the plea in those cases does not apply to attachments; and such a plea by a garnishee was disregarded.[8] In Connecticut this case occurred: A. and B., a firm in New York, and C., D., and E., a firm in Connecticut, entered into a joint real estate speculation, the net profits of which were to be equally divided between the two firms. The title to the land was conveyed to B., of the former firm, and C., of the latter, as agents of their respective firms; and all transfers and conveyances thereof were made by them; and C. was the treasurer of the speculation, and received and paid out all moneys connected therewith. C., on behalf of the members of both firms, contracted with M. for the erection of a building; but M. was not at any time informed that A. and B. were interested in the speculation or in the contract with him. He performed the work, and there became due him therefor, $2030. Thereafter suits by attachment were brought by several parties against M., in which all the partners in the two firms, *except A.*, were garnished, and judgments having been obtained therein, and executions issued, and demand made upon C., he paid the amounts of the judgments. Afterwards H. brought suit against M., and garnished *all* the members of both firms, and upon the judgment therein obtained C. paid, as garnishee, $121.85, which was not sufficient to satisfy H.'s judgment. Thereupon H. claimed his right to a further payment from the members of the firm, which they resisted, claiming that the previous payments made by C., under the prior judgments, were valid, and constituted *pro tanto* a discharge of their liability. H. contended that the non-joinder of A. as garnishee in those suits might have been set up by the

Hudson *v.* Hunt, 5 Ibid. 538; Atkins *v.* Prescott, 10 Ibid. 120.

[1] Pettes *v.* Spalding, 21 Vermont, 66. See Wellover *v.* Soule, 30 Michigan, 481.

[2] Wilson *v.* Albright, 2 G. Greene, 125.

[3] Hoskins *v.* Johnson, 24 Georgia, 625.

[4] Hirth *v.* Pfeifle, 42 Michigan, 31; Markham *v.* Gehan, Ibid. 74; Kennedy *v.* McLellan, 76 Michigan, 598; Hamilton *v.* Rogers, 67 Ibid. 135; Landsberg *v.* Bullock, 79 Ibid. 278.

[5] O'Connell *v.* Ackerman, 62 Maryland, 337.

[6] Ellicott *v.* Smith, 2 Cranch C. C. 543.

[7] Frizzell *v.* Willard, 37 Arkansas, 478.

[8] Brealsford *v.* Meade, 1 Yeates, 488.

garnishees as a defence, and therefore must be available in H.'s favor against the validity of the garnishments in which A.'s name was omitted. This position was not sustained, and the payments made by C. were held a valid defence against any further liability of the members of the firms as garnishees.[1]

§ 562. But where the garnishees were partners in a firm, part of the members of which resided in another State, and the names of all the members were contained in the writ, it was held that, as, if an action had been brought against them, a service on those within the jurisdiction would be sufficient, so the garnishment of the resident partners was sufficient to hold the funds of the defendant in the hands of the firm.[2]

§ 563. And in all such cases, as well where the co-debtors not summoned reside within the State, and the garnishees do not object on that account to answer,[3] as where those not summoned reside out of the State,[4] if it appear by the answers that time is wanted to ascertain the condition of the funds, or the liability of any of the other partners, who are not summoned, on account of any acceptance or engagement they have entered into, or of any suit brought against them, the process will be stayed until full information can be obtained.[5]

§ 564. There is, however, a case which constitutes an exception to the rule that resident partners may be garnished, and the funds in the hands of the firm thereby attached, though other members of the firm reside in another State. The exception is, where part of the firm reside in this country and part in a foreign country. There, it has been decided that the resident partners cannot be held as garnishees.[6]

§ 564 *a*. Where a garnishment proceeding is instituted against a firm, the names of the individual members of it must be set out in the process. A proceeding against "the firm of A., B., & Co." charges no member of it.[7]

§ 565. Where several persons, members of a partnership, are summoned as garnishees, and one of them answers, admitting a

[1] Hawley *v.* Atherton, 39 Conn. 309.

[2] Parker *v.* Danforth, 16 Mass. 299; Atkins *v.* Prescott, 10 New Hamp. 120; Warner *v.* Perkins, 8 Cushing, 518; Peck *v.* Barnum, 24 Vermont, 75.

[3] Hathaway *v.* Russell, 16 Mass. 473.

[4] Parker *v.* Danforth, 16 Mass. 299.

[5] Parker *v.* Danforth, 16 Mass. 299; Cushing's Trustee Process, § 92.

[6] Kidder *v.* Packard, 13 Mass. 80.

[7] Reid *v.* McLeod, 20 Alabama, 576.

debt due from the firm to the defendant, it is held, in Mississippi, that his answer will authorize a judgment against all the partners.[1]

§ 565 *a*. Where several persons are summoned under the same writ, as garnishees of the same defendant, and they are not jointly indebted to the latter, neither one can defend against his liability by showing that he was not jointly indebted with the other garnishees: the liability of each must be determined by his individual relations to the defendant.[2]

§ 566. *His liability as affected by the number of the Defendants and the number of his Creditors.* Where there are several defendants, the property of each is of course liable for the whole debt. In such case, if it appear that the garnishee is indebted to one or more of the defendants, though not to all, he will be charged.[3] But where a garnishee is indebted to several persons jointly, an important, and, in one of its aspects, a vexed, question arises, whether, in respect of that indebtedness, he can be charged as garnishee of part of his creditors. This question will be considered under two heads: I. In relation to Partnerships; and II. In relation to other cases of joint creditors of the garnishee.

§ 567. I. *Partnerships.* The attachment of a debt due to a copartnership, in an action against one of the partners, is justly distinguishable from the seizure on attachment or execution of tangible effects of the firm for the same purpose. Hence we find the Supreme Court of Alabama holding, in the same case, that partnership property may be sold to pay the debt of one partner, but that a debt due to a firm cannot be taken by garnishment for that purpose. The reason assigned is, that in the case of a sale, the property is not removed, and cannot be appropriated until all liens upon it, growing out of or relating to the partnership, are discharged; while in the other case, the judgment against the garnishee, if acquiesced in, changes the right of property, and devests the copartner's title to the property attached; which cannot be done so long as the partnership accounts remain unsettled, or its debts unpaid.[4] Much force is

[1] Anderson *v.* Wanzer, 5 Howard (Mi.), 587.

[2] Curry *v.* Woodward, 53 Alabama, 371.

[3] Thompson *v.* Taylor, 13 Maine, 420; Stone *v.* Dean, 5 New Hamp. 502; Parker *v.* Guillow, 10 Ibid. 103; Caignett *v.* Gilbaud, 2 Yeates, 35; Locket *v.* Child, 11 Alabama, 640. *Sed contra*, Ford *v.* Detroit D. D. Co., 50 Michigan, 358; Farwell *v.* Chambers, 62 Ibid. 316.

[4] Winston *v.* Ewing, 1 Alabama, 129.

given to this reason, when it is remembered that garnishment is essentially a legal proceeding, and not adapted for the ascertainment and settlement of equitable rights between the garnishee and the defendant; and that a court of law has no power to impound the debt, until, by an adjustment of all the partnership affairs, it shall appear whether the defendant has any and what interest in the general surplus, or in the particular debt so impounded.[1]

§ 568. In Massachusetts, this question came up at an early day, and the court, while deciding that the garnishee could not be charged, intimated that if a partner of the firm were summoned, and disclosed that the defendant had an interest in the partnership effects after all the partnership debts were paid, the garnishee might be held.[2] There are, however, great and apparently insuperable difficulties in the way of such an investigation, which will immediately occur to the legal mind, and demonstrate its impracticability. The same point came up before Justice STORY, on the circuit, in a case where, in a suit against G. & G., the garnishee answered that he was indebted to G. & L.; one of the defendants being a member of both firms. The court, in deciding against the liability of the garnishee, observed: "In order to adjudge the trustee responsible in this suit, it must be decided, that the funds of one partnership may be applied to the payment of the debts of another partnership, upon the mere proof that the principal debtor has an interest in each firm. If this be correct, it will follow that a separate creditor of one partner will have greater equitable, as well as legal rights, than the partner himself has. The general rule undoubtedly is, that the interest of each partner in the partnership funds is only what remains after the partnership accounts are taken; and unless upon such an account the partner be a creditor of the fund, he is entitled to nothing. And if the partnership be insolvent, the same effect follows."[3]

§ 569. In Connecticut, this subject was elaborately and ably considered, in a case where there were three members of a firm to which the garnishee was indebted, and he was garnished in a suit against one of them. There the court said: "The creditor

[1] Johnson *v.* King, 6 Humphreys, 233.

[2] Fisk *v.* Herrick, 6 Mass. 271; Upham *v.* Naylor, 9 Ibid. 490; Hawes *v.* Waltham, 18 Pick. 451; Bulfinch *v.* Winchenbach, 3 Allen, 161.

[3] Lyndon *v.* Gorham, 1 Gallison, 367. See Upham *v.* Naylor, 9 Mass. 490; Ullman *v.* Eggert, 30 Illinois Appellate, 310.

can, by a foreign attachment, take nothing but what the absconding debtor was entitled to; and the property of one man ought not to be taken to pay the debt of another. But the rule claimed by the plaintiffs would violate both these principles. It is well known, that in partnerships the effects do not usually belong to the partners equally, in proportion to the number. Sometimes, one will advance the capital, which is to be returned, while the other is to transact the business, and the profits only are to be shared between them. The effects might be wanted, not only to pay the partnership debts, but, on a settlement of the accounts, the partner in the execution might be a debtor of the partnership. If, then, we consider them tenants in common, and permit a creditor to sell one-half to pay the separate debt of one partner, we shall, in many instances, suffer the property of one man to be taken to pay the debts of another; and give to a separate creditor of a partner a right over the effects of a partnership, which such partner could not exercise; and if the purchaser should be allowed to take possession of the effects, he might dissolve or destroy the partnership. But further: from the nature of partnerships, one partner cannot have a separate right in any particular debt or article of property, belonging to the partnership, liable to his individual debt; but all the effects are a joint interest; and each partner can have a separate interest only in his share upon the winding up and settlement of the partnership concerns."[1]

§ 570. The position taken in those decisions is supported by the courts of New Hampshire,[2] Vermont,[3] Rhode Island,[4] New York,[5] Maryland,[6] Louisiana,[7] Mississippi,[8] Tennessee,[9] Ohio,[10] Illinois,[11] Missouri,[12] and Kansas.[13] In Maine,[14] Pennsylvania,[15]

[1] Church *v.* Knox, 2 Conn. 514.

[2] Atkins *v.* Prescott, 10 New Hamp. 120.

[3] Towne *v.* Leach, 32 Vermont, 747.

[4] Sweet *v.* Reed, 12 Rhode Island, 121.

[5] Barry *v.* Fisher, 39 Howard Pract. 521.

[6] People's Bank *v.* Shryock, 48 Maryland, 427, overruling Wallace *v.* Patterson, 2 Harris & McHenry, 463.

[7] Smith *v.* McMicken, 3 Louisiana Annual, 319; Thomas *v.* Lusk, 13 Ibid. 277.

[8] Mobley *v.* Lonbat, 7 Howard (Mi.), 318; Williams *v.* Gage, 49 Mississippi, 777.

[9] Johnson *v.* King, 6 Humphreys, 233.

[10] Myers *v.* Smith, 29 Ohio State, 120.

[11] Ripley *v.* People's S. Bank, 18 Bramwell, 430.

[12] Kingsley *v.* Missouri Fire Co., 14 Missouri, 467; Sheedy *v.* Second Nat. Bank, 62 Ibid. 17; Pullis *v.* Fox, 37 Missouri Appeal, 592.

[13] Trickett *v.* Moore, 34 Kansas, 755.

[14] Whitney *v.* Munroe, 19 Maine, 42; Thompson *v.* Lewis, 34 Ibid. 167; Smith *v.* Cahoon, 37 Ibid. 281; Burnell *v.* Weld, 59 Ibid. 423; Parker *v.* Wright, 66 Ibid. 392.

[15] McCarty *v.* Emlen, 2 Dallas, 277; 2 Yeates, 190; Lewis *v.* Paine, 1 Legal Gazette R. 508.

and South Carolina,[1] the contrary doctrine prevails; but in the reported cases in those States we look in vain for any substantial foundation of reason or expediency upon which it can rest, or for any views calculated to shake confidence in the conclusion, that partnership credits can in no case be taken, by garnishment, to pay the individual debt of one member of a firm.[2]

The extent to which the courts will uphold the rights of partnership creditors to partnership assets, as against a creditor of an individual member of the firm, is illustrated in a case in Maine, where one member of an insolvent firm, which kept its deposit account with a bank, was individually indebted to the bank, and without the knowledge of his partners, gave the bank the checks of the firm on the copartnership funds in payment of that debt; after which creditors of the firm garnished the bank; and the court sustained the garnishment; holding that the bank knew that the payment to it was a misapplication of the funds of the firm; that it was a fraud upon the other members of the firm, unless the firm had enough to pay all its debts and liabilities; that the bank held the partnership money so paid to it in trust for the benefit of the partners; and that partnership creditors could by garnishment charge the bank as a debtor of the firm. This was twice held by the Supreme Court of Maine; *first*, when the note paid by the firm's check was that of one partner alone; and *second*, when it was a note of one partner, endorsed by the other partner as surety.[3]

§ 571. But when the partnership has been dissolved by the death of one or more partners, leaving one survivor, it is considered that, as the sole surviving partner is, in law, the owner of all the partnership effects, a debt due to the late partnership may be attached in an action against the survivor.[4]

§ 572. II. *Other Cases of Joint Creditors of the Garnishee.* A question arises as to the liability of a garnishee, where he is indebted to two persons jointly, who are not partners, and is

[1] Schatzill *v.* Bolton, 2 McCord, 478; Chatzel *v.* Bolton, 3 Ibid. 83.

[2] The Supreme Court of California, while holding that, under the laws of that State, partnership credits may be attached for the debt of one of the partners, yet decided that they cannot be subjected to the payment of his debt, unless it appear that, upon a settlement of the partnership affairs, there will be something coming to the partner against whom the attachment is laid. Robinson *v.* Tevis, 38 California, 611.

[3] Johnson *v.* Hersey, 70 Maine, 74; 73 Ibid. 291.

[4] Knox *v.* Schepler, 2 Hill (S. C.), 595; Berry *v.* Harris, 22 Maryland, 30.

summoned as garnishee of one of them. This, it will be perceived, is a different case from that we have been considering, and may be sustained on principle.

In Maine, A. and B. contracted with C. to cut and haul lumber, and went on with the performance of the contract; and C., at the time of the garnishment, was indebted to them jointly in a certain sum of money. The question was, whether, in respect of that debt, C. could be charged as garnishee of A. alone; and the court held that he could.[1] In Missouri, the same point was decided in a case where the garnishee was the maker of a note payable to two jointly; but the court do not give at large the reasons for their decisions.[2]

The same result was arrived at in Massachusetts, in a case where the garnishees had in their possession money belonging to A. & B., joint owners of a ship, the proceeds of the sale of a cargo of silks, and were garnished in an action against B. It was objected that the garnishees were not liable, because the money in their hands was the joint property of A. & B.; but the court held that a creditor of either might attach a moiety of the proceeds, and charged the garnishees.[3]

There is in Massachusetts a later case, which might seem to militate against this doctrine, and therefore demands notice.[4] A. & B. contracted with a town to erect a barn and do some other work for a stipulated compensation. After the work was done, the town was garnished in two suits against B., and in its answers disclosed its indebtedness to A. & B. jointly, and judgments were rendered against it in respect of B.'s share of the debt. Afterwards A. & B. joined in an action against the town, and the judgments rendered against the town, as garnishee of B., were set up in bar *pro tanto* of the recovery. The court, after referring to the garnishments, say: "In each of those suits the town was charged, and a portion of the debt due to the plaintiffs jointly was thus adjudged liable to be appropriated by process of law to the payment of the several debt of one of them. This, we think, was erroneous. It seems to be now settled by authorities that a joint debt cannot thus be severed and appropriated, in whole or in part, to discharge the several debt of one." In support of this broad and general proposition, the

[1] Whitney *v.* Munroe, 9 Maine, 42.

[2] Miller *v.* Richardson, 1 Missouri, 310.

[3] Thorndike *v.* De Wolf, 6 Pick. 120. In Hanson *v.* Davis, 19 New Hamp. 133, the Superior Court of New Hampshire took the contrary ground. See French *v.* Rogers, 16 New Hamp. 177; Fairchild *v.* Lampson, 37 Vermont, 407.

[4] Hawes *v.* Waltham, 18 Pick. 451.

court refer to cases already herein considered, of attaching partnership credits for the debt of part of the firm, and then proceed with remarks which apply only to such a case. The case before the court is evidently treated as one of partnership; and the court conclude their opinion on this branch of the controversy with these words: "It appears, by the answers of the town, that they were indebted to the two jointly, *without anything further appearing.* In such a case the court are of opinion that they could not be charged, in a suit against one only." We are left to the conclusion that, if it had appeared to the court that the debt was due to A. & B. jointly, but not as partners, the decision might have been otherwise. Whether, however, the court intended to give such an intimation, or not, it is quite certain that the question of the liability of a garnishee under such circumstances was not passed upon by the court.

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CHAPTER XXVIII.

THE GARNISHEE'S LIABILITY AS A PARTY TO A PROMISSORY NOTE.

§ 573. VARIOUS questions of interest arise in the consideration of this subject. The attempt to subject the maker of a promissory note to garnishment, in a suit against the payee, necessarily brings to light, in some of its aspects, serious difficulties. Principal among these is the danger that the maker, if subjected as garnishee, may, without any fault on his part, be compelled to pay the amount of the note a second time. That such a result is possible, is enough in itself to give importance to our present inquiries. The subject will be considered, I. In regard to unnegotiable notes; and II. With reference to negotiable notes.

§ 574. I. *Unnegotiable Notes.* By notes of this description are meant all notes which are not governed by the law merchant. Usually the maker is entitled to every defence against the payee, arising at any time before he receives notice of the assignment of the note. In some States, however, he can interpose between himself and a *bona fide* assignee no defence which arose after the assignment was in fact made, though he had no knowledge of its having been made.

§ 575. Wherever notice of an assignment is required to be given by the assignee to the maker, there can be no good reason why the latter should not be held as garnishee of the payee, at any time before he receives such notice; but unquestionable reasons why he should. He is indebted to the payee by written promise, and if in respect of that indebtedness he be charged as garnishee, he is in no sense injured thereby, for no assignment made *after* he is garnished can prevent his setting up his payment as garnishee as a defence against the note in the assignee's hands, even though the assignee acquired title *bona fide* and was

ignorant of the garnishment.[1] In such cases the *laches* of the assignee occasions his loss.

§ 576. When the maker of an unnegotiable note is thus garnished, if he have received notice of an assignment of the note, made before the garnishment, he should state it in his answer; or if he be afterward notified of such antecedent assignment, in time to amend his answer before judgment is rendered thereon, he should make it known to the court; and if he fail to do so, he cannot avail himself of the payment of the judgment rendered against him as garnishee, in defence of an action brought by the assignee.[2] So, if he have been sued on the note by persons styling themselves assignees.[3] And it matters not whether the information he has received of an assignment be in fact true or false; it is equally his duty to make it known in his answer.[4] And if the garnishee, at any time before payment of the judgment against him, receive notice of an assignment made before he was garnished, and fail to take proper steps to prevent payment of the judgment, it is said that such payment will be in his own wrong, and will constitute no valid defence to the claim of the assignee.[5]

§ 577. These rules apply with equal force where, as at the common law, no action can be maintained on such notes except in the name of the payee, and where, as in many States, the assignee is authorized by statute to sue in his own name. In the latter case, the assignee is invested with a legal right, which he may enforce by an action at law, and it is therefore complete. In the former, the right is merely equitable, and not susceptible of enforcement by the assignee in his own name, except in a court of equity; but it is none the less, in this proceeding, entitled to the protection of the courts; which, with great uniform-

[1] Dore *v.* Dawson, 6 Alabama, 712; Robinson *v.* Mitchell, 1 Harrington, 365; Covert *v.* Nelson, 8 Blackford, 265; Comstock *v.* Farnum, 2 Mass. 96; Clark *v.* King, Ibid. 524; Junction R. R. Co. *v.* Cleneay, 13 Indiana, 161; Shetler *v.* Thomas, 16 Ibid. 223; Canaday *v.* Detrick, 63 Ibid. 485; Elston *v.* Gillis, 69 Ibid. 128. In Alabama no notes are recognized as governed by the principles of the law merchant, but such as are made payable *in bank*.

[2] Crayton *v.* Clark, 11 Alabama, 787; Foster *v.* White, 9 Porter, 221; Colvin *v.* Rich, 3 Ibid. 175; Cross *v.* Haldeman, 15 Arkansas, 200; Lewis *v.* Dunlop, 57 Mississippi, 130.

[3] Stubblefield *v.* Hagerty, 1 Alabama, 38; Smith *v.* Blatchford, 2 Indiana, 184.

[4] Foster *v.* Walker, 2 Alabama, 177; Wicks *v.* Branch Bank, 12 Ibid. 594.

[5] Oldham *v.* Ledbetter, 1 Howard (Mi.), 43.

ity, have sustained equitable assignments against attachment for the debts of the assignors.[1]

§ 578. What will be a sufficient statement of an assignment in the answer of a garnishee must depend, to some extent, upon the force given to the answer under the system of practice in each State. In Massachusetts, at the time when the garnishee's liability was determined solely by his answer, and no extrinsic evidence, tending either to fix or defeat his liability, could, even with the consent of plaintiff, defendant, and garnishee, be introduced, it was held, that the assignee, in order to avail himself of the assignment, must exhibit to the garnishee, before he is examined, satisfactory evidence of a legal assignment, made before the attachment, in order that the garnishee may in his answer lay the evidence before the court.[2] The same rule prevails in Maine.[3] Hence, if such evidence be produced to the garnishee, and embodied in his answer, he cannot be charged, though it appear that the payee sold the note for the express purpose of absconding and defrauding his creditors.[4]

In the Revised Statutes of Massachusetts of 1836, and in the General Statutes of that State of 1860, it was provided that "the answers and statements sworn to by a trustee shall be considered as true, in deciding how far he is chargeable, but either party may allege and prove any other facts not stated nor denied by him, that may be material in deciding that question." Under this statute a garnishee answered that he had given the defendant certain notes, which he was informed and believed had been transferred by the defendant to a creditor of the defendant, for a valuable consideration; but he had not been informed and did not know who was the owner of the notes. No additional allegations were filed, nor collateral proofs offered, by the plaintiff; and the garnishee's liability was therefore to be determined solely upon his answer. It was objected by the plaintiff that the garnishee did not state the assignment as of his own knowledge; but the court overruled the objection; holding that if the garnishee answers fairly and makes a full disclosure, the facts which he states to be true from his information and belief are to be considered as true, as well as those stated on his own knowledge.[5]

[1] See Chapters XXIV. and XXXI.

[2] Foster *v.* Sinkler, 4 Mass. 450; Wood *v.* Partridge, 11 Ibid. 488.

[3] McAllister *v.* Brooks, 22 Maine, 80.

[4] Newell *v.* Adams, 1 D. Chipman, 346; Hutchins *v.* Hawley, 9 Vermont, 295; Burke *v.* Whitcomb, 13 Ibid. 421.

[5] Fay *v.* Sears, 111 Mass. 154.

§ 579. Where, however, as is generally the case, the answer of the garnishee may be controverted and disproved; and more especially where, if the answer sets up an assignment of the note, the supposed assignee may be cited into court, and required to substantiate the assignment; it cannot be considered necessary for the garnishee to set forth in his answer the evidence of the assignment; it will be sufficient for him to state that he has received notice of it. And when he so states, no judgment can be rendered against him *on the answer*, whether the information he has received of the assignment be true or false. If the plaintiff suppose the notice, or the garnishee's statement of it, to be false, the answer should be contested, and if not contested the garnishee must be discharged; for it not only does not appear that he is indebted to the defendant, but the answer shows indebtedness to the assignee.[1]

§ 580. In the class of cases to which we have attended, it will be seen that the fact of notice to the maker of the note of its assignment is of first importance. But where, as in some States, the assignment of a note is *per se* operative and effectual, and no notice to the maker is required, how is the maker to be charged as garnishee of the payee, without liability to a second payment to the assignee? If, ignorant of any assignment, he, in his answer, admit an indebtedness to the defendant, and judgment be rendered against him, and afterwards an assignee of the note, under an assignment made before the attachment, claim its payment, can it be resisted? Shall the assignee be prejudiced by a proceeding to which he was no party, and of which he was ignorant? Or, shall he be required to give notice of the assignment,

[1] Colvin *v.* Rich, 3 Porter, 175; Foster *v.* White, 9 Ibid. 221; Foster *v.* Walker, 2 Alabama, 177; Wicks *v.* Branch Bank, 12 Ibid. 594; Yarborough *v.* Thompson, 3 Smedes & Marshall, 291; Thompson *v.* Shelby, Ibid. 296; Cadwalader *v.* Hartley, 17 Indiana, 520. In Illinois, it was at one time held, that the mere statement by a garnishee in his answer, that he had, after his garnishment, been notified that his debt to the defendant had been assigned by the latter before the garnishment, without any evidence, or even the expression of an opinion, that the assignment was genuine, is not sufficient of itself to discharge the garnishee; but will justify the court in requiring the supposed assignee to appear and establish the genuineness of the assignment; in default of which, the judgment against the garnishee would be a bar to a subsequent action by the assignee. Born *v.* Staaden, 24 Illinois, 320. In a later case, however, it was there held, that no judgment could be given against a garnishee, on his answer, who stated that he had given the defendant a note; had last seen it in his possession before the garnishment took place; had been told by defendant that he had sold it before the garnishment; and it had since been presented to him for payment by another person who claimed to own it. Wilhelmi *v.* Haffner, 52 Illinois, 222.

in order to prevent his money from being taken to pay another's debt, when the law vests the title fully in him, without the necessity of such notice? On the other hand, shall the garnishee be compelled to pay twice? These inquiries serve to illustrate the difficulty of charging the maker of a note, which, though not negotiable by the law merchant, may yet be assigned without notice to the maker, so as to cut off any defence he might have against the payee, arising after the assignment, and before he comes to the knowledge of it. This difficulty was experienced by the Supreme Court of Missouri, at a time when the statute (since changed) gave the maker of an unnegotiable note a right of defence against the assignee, only in respect of matters which existed prior to the assignment; and led that court to the only safe conclusion, that such notes, as regards liability to attachment, must be regarded as on the same footing with negotiable paper.[1]

§ 581. The cases previously cited refer altogether to notes executed within the States where the decisions were made. A question of some interest is presented, where the maker of a note, given or negotiated in a State where it is held to be negotiable, is garnished in a State where the same note would be considered unnegotiable. It has been ruled, that the character of the note, with reference to this proceeding, must be determined by the law of the State where it was given or negotiated; and that if negotiable there, the maker will not be charged as garnishee of the payee. Thus, where A., having in Massachusetts executed a negotiable note, payable there to B., was summoned in Vermont as B.'s garnishee, where the note would not be considered negotiable; it was held, that inasmuch as it was by the *lex loci contractus* negotiable, and therefore not attachable, it could not be attached in Vermont by garnishing the maker.[2] So, where A. executed in Pennsylvania, and delivered to B., in New York, a promissory note, which, by the law of the former State, was unnegotiable, but by that of the latter was negotiable; and before the note became due, A. was summoned as garnishee of B.; it was held, that, though the note was drawn in Pennsylvania, it was delivered and took effect in New York, and was liable to the law of that State, which gave it the effect of a foreign bill of exchange, and therefore the maker was exempted

[1] St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Missouri, 421. See Speight *v.* Brock, Freeman, 389.

[2] Baylies *v.* Houghton, 15 Vermont, 626.

from garnishment on account of the payee.[1] And so, in Indiana, as to a note executed and payable in Ohio.[2] But where a resident of Vermont made a negotiable note to a resident of Massachusetts, payable at a bank in Vermont, where he could, under the statute, be subjected to garnishment in respect thereof, he was charged, because he resided, *and the note was payable*, in Vermont, though by the law of Massachusetts he could not have been charged.[3]

§ 582. II. *Negotiable Notes.* Any difficulties which, under any system, attend the garnishment of the maker of an unnegotiable note, in an action against the payee, are trivial compared with those which beset a like attempt in the case of a negotiable note; no notice of the transfer of which is necessary, and which is intended to pass from hand to hand as cash; each holder, before its maturity, feeling himself secure, and entitled to be secure, against any defence which the maker might have against the payee. The injurious results of subjecting such paper to attachment, have led in some States to its express exception, by statute, out of the operation of the process. In States where the statutes are silent on this point, the courts have differed in their views.

§ 583. It is difficult to perceive any substantial justification of such a proceeding; while, obviously, it disregards principles which, by general consent, have been laid at the foundation of all attempts to subject garnishees to liability. It cannot be without benefit to recur to those principles in this connection. 1. Without dissent, it is impossible to charge a garnishee as a debtor of the defendant, unless it *appear affirmatively*, that at the time of the garnishment, the defendant had a cause of action against him, for the recovery of a legal debt, due, or to become due, by the efflux of time.[4] 2. The attachment plaintiff can hold the garnishee responsible (except in some few cases which have

[1] Ludlow *v.* Bingham, 4 Dallas, 47. See Green *v.* Gillett, 5 Day, 485.

[2] Smith *v.* Blatchford, 2 Indiana, 184.

[3] Emerson *v.* Partridge, 27 Vermont, 8.

[4] *Ante*, § 461; *post*, § 659; Wetherill *v.* Flanagan, 2 Miles, 243; Bridges *v.* North, 22 Georgia, 52; Allen *v.* Morgan, 1 Stewart, 9; Pressnall *v.* Mabry, 3 Porter, 105; Smith *v.* Chapman, 6 Ibid. 365; Mims *v.* Parker, 1 Alabama, 421; Foster *v.* Walker, 2 Ibid. 177; Fortune *v.* State Bank, 4 Ibid. 385; Connoley *v.* Cheeseborough, 21 Ibid. 166; Estill *v.* Goodloe, 6 Louisiana Annual, 122; Harney *v.* Ellis, 11 Smedes & Marshall, 348; Brown *v.* Slate, 7 Humphreys, 112; Davis *v.* Pawlette, 3 Wisconsin, 300; Wilson *v.* Albright, 2 G. Greene, 125; Pierce *v.* Carleton, 12 Illinois, 358; People *v.* Johnson, 14 Ibid. 342; Ellicott *v.* Smith, 2 Cranch C. C. 543; Edney *v.* Willis, 23 Nebraska, 56.

been referred to, and have no application here) only so far as the defendant might hold him by an action at law. 3. The garnishee is, under no circumstances, to be placed by the garnishment in a worse condition than he would otherwise be in. 4. No judgment should be rendered against him as garnishee, where he answers fairly and fully, unless it would be available as a defence against any action afterwards brought against him, on the debt in respect of which he is charged.

§ 584. Applying these well-established principles to this subject, it would seem quite impracticable to charge the maker of a negotiable promissory note, as garnishee of the payee, so long as the note is still current as negotiable paper. This character it bears until it becomes due; and no operation which can be given to the garnishment of the maker can change its nature in this respect.

§ 585. While the note is current as negotiable paper, it is usually very difficult for the maker to say whether, at the time of the garnishment, it was still the property or in the possession of the payee. If he answers that he does not know whether it was so or not, certainly he should not be charged, because it does not *appear affirmatively* that he was, when garnished, indebted to the defendant; and unless that fact do so appear, no court can rightfully render judgment against him. The most that can be claimed is, that he *may* be so indebted, which is manifestly insufficient. The great fact necessary to charge him is not shown, but only conjectured. The whole matter is in doubt; and while in doubt the court cannot with truth record that the garnishee is found to be indebted to the defendant; and unless that be found by the judgment of the court there is no ground for charging the garnishee.[1]

This difficulty is not removed by resorting to the presumption that the debt, being shown to have once existed, still exists. Presumptions of that description are founded on the *experienced* continuance or permanency of a state of things, or a relation, which is found to have once existed. They are available only so far as experience shows the state of things, or the relation, likely to continue. When it is shown that *the nature of the subject* is inconsistent with the presumption, the presumption cannot arise. When, therefore, it appears that a garnishee, before

[1] This paragraph was adopted as law by the Supreme Court of Mississippi, in McNeill *v.* Roache, 49 Mississippi, 436.

he was summoned, made a negotiable note to the defendant, no presumption arises that he was, when garnished, a debtor of the defendant in respect of that note, because the negotiable character of the note is given to it for the very purpose of its being negotiated, and experience teaches that such notes are not usually held by the payees until maturity, but are the subjects of incessant transfers by indorsement and delivery.

But though the garnishee should answer that the defendant, at the time of the garnishment, was the owner of the garnishee's note, not then due, no judgment should be rendered against him, because *his obligation is not to pay to any particular person but to the holder, at maturity, whoever he may be.*[1] Can the garnishee, or the defendant, or the court, say that the defendant will be the holder of the note at its maturity? Certainly not; and yet to give judgment against the garnishee necessarily assumes that he will be; or, in disregard of the contrary probability, holds the garnishee to a responsibility which he may have to meet again in an action by a *bona fide* holder at maturity.

It results hence that no such judgment can be rendered, without placing the garnishee in a worse situation than he would otherwise be in, by requiring him to pay to the plaintiff money which he may, and probably will, afterwards be compelled to pay again to an innocent holder of the note. It is no answer to this to say, that he may not be compelled to pay a second time; for the presumption from the character of the paper is the other way; and the mere liability to such second payment is sufficient to place him in a worse condition than he would otherwise be in. The only way to avoid this is to give the garnishment the effect of destroying the negotiability of the note; a proposition which bears on its face its own condemnation.

Finally, this proceeding clearly violates the undoubted principle that no judgment can properly be rendered against a garnishee who fully and truly answers, unless it will avail him as a defence against any one who afterwards attempts to recover the same debt from him by action. This important rule can in no case be dispensed with, without manifest injustice to the garnishee. It is not sufficient that the garnishee *may* be protected; it is the duty of the court, with the whole case before it, to ascertain whether its judgment will be effectual to that end; and if it do not appear that it will, it should not be given. Manifestly, then, in this case, no judgment should be given against

[1] Sheets *v.* Culver, 14 Louisiana, 449; Richards, 9 California, 365; Gregory *v.* Kimball *v.* Plant, Ibid. 511; McMillan *v.* Higgins, 10 Ibid. 339.

the garnishee; for it will not avail him as a defence to a suit by a *bona fide* holder, who acquires title to the note before its maturity. He is no party to the judgment; his rights are not passed upon by the court; and it is simply absurd to claim that he is concluded or affected by the judgment. And yet no court can consistently sustain the attachment of negotiable paper, while it is still current, without claiming for its judgment conclusive effect in favor of the garnishee against all the world, — in which case a *bona fide* holder may lose the amount of the note, — or leaving the door open for the garnishee to be compelled to pay the same debt a second time.

§ 586. The only expedient which has yet been suggested for avoiding the difficulties attending the garnishment of the maker of a negotiable note while current, originated with the Supreme Court of Missouri; by which it was at one time intimated [1] (but afterwards expressly decided the other way [2]) that an indorsee, having no notice of the attachment, might recover back from the attachment plaintiff the amount recovered by him from the maker, as garnishee of the payee.

§ 587. The foregoing considerations lead to the conclusion that, as a general rule, the maker of a negotiable note should not be charged as garnishee of the payee, under an attachment served before the maturity of the note, *unless it be affirmatively shown, that, before the rendition of the judgment, the note had become due, and was then still the property of the payee.*[3] Let us now examine the bearing of the adjudications on this subject.

§ 588. In several States, it has been decided, on principle, uninfluenced by statutory provisions, that the maker of a negotiable note shall not be charged as garnishee of the payee while the note is still current. In New Hampshire, the court said: "The reason of this rule is founded upon the negotiable quality of the paper. If the trustee could be charged in such a case, then it might happen that either a *bona fide* purchaser of the note must lose the amount of it, or the maker, without any fault on his part, be compelled to pay it twice. To avoid such a dilemma the rule

[1] Quarles *v.* Porter, 12 Missouri, 76; Colcord *v.* Daggett, 18 Ibid. 557.

[2] Funkhouser *v.* How, 24 Missouri, 44; Dickey *v.* Fox, Ibid. 217.

[3] This rule seems to me to be the only one which can allow of the attachment of negotiable paper, without interfering with the rights of third parties, unless the suggestion of the Supreme Court of Pennsylvania, in Kieffer *v.* Ehler, 18 Penn. State, 338, *to impound the note*, should be adopted.

was established." But, while announcing this general doctrine, the court charged the garnishee, because it appeared that the notes he had given the defendant were, at the time of the garnishment, in the garnishee's own hands, having, with other notes, been deposited with him by the defendant, to indemnify him for becoming the defendant's bail. In reference to this state of facts the court said: "When the process was served upon the trustee, he had the notes he had given in his own hands, and under his own control; and those notes could not be transferred to any other person in the ordinary course of business, while he then held them, nor can he be held to pay them again, if he shall be charged in this suit on that account. The reasons on which the rule is founded do not then appear to exist in this case." [1]

In Vermont, before the revision of the statutes, in 1836, it was held, that the maker of a negotiable note might be charged as garnishee of the payee, notwithstanding an assignment of the note before the attachment, unless notice of the assignment had been given to the maker.[2] The particular provision which justified this construction was that the maker of a note, when sued by an indorsee, might not only have offsets of all debts due him from the payee *before notice of the indorsement*, but could give in evidence anything which would equitably discharge him in an action by the payee. By the statute of 1836, this provision was repealed in relation to negotiable notes, and the effect of the repeal was to put all negotiable notes on the footing of mercantile paper in a commercial country.[3] Thence followed a change in the decisions of the court; and it was afterwards held, that the negotiation of a note of this character, before it became due, required no notice to the maker, and would defeat an antecedent garnishment of him in an action against the payee.[4] The same court subsequently took stronger ground, in a case where negotiable notes had been executed, and were not yet due, and the maker was summoned as garnishee of the payee; and said: "We ought not to hold the maker of the notes liable, unless he could rely upon this judgment as a complete defence against the notes. This he could not do, if, at the time of rendering the judgment,

[1] Stone *v.* Dean, 5 New Hamp. 502. Since the decisions in New Hampshire stated in the text, a statute has been enacted in that State, which subjects the maker of a negotiable note to be garnished in a suit against the payee, at any time before the note is transferred. See Rev. Statutes of New Hampshire, of 1843, ch. 208, §§ 18, 19, and Amoskeag Man. Co. *v.* Gibbs, 8 Foster, 316.

[2] Britton *v.* Preston, 9 Vermont, 257.

[3] Hinsdill *v.* Safford, 11 Vermont, 309.

[4] Hinsdill *v.* Safford, 11 Vermont, 309; Little *v.* Hale, Ibid. 482.

the notes had been already indorsed, and the indorsee was not before the court. We cannot know that this is not the case. But if we could know that the notes were now in the hands of the payee, in order to hold the maker liable we must destroy the future negotiability of the notes, and thus put it in the power of the holder to impose upon innocent purchasers, or else enable the holder to defraud the maker by negotiating the notes after the judgment in the attachment suit. *There seems to be no other mode of securing the interests of all concerned, short of denying all right to attach, by this process, the interest in negotiable paper while current.*" [1]

In Pennsylvania, the distinction between negotiable and unnegotiable notes did not formerly prevail. All notes were there unnegotiable, though assignable in a particular manner prescribed by law. Whether the maker of a negotiable note could be held as garnishee of the payee, received, nevertheless, an early decision in that State, in the previously cited case of a note executed there, and unnegotiable, but delivered to the payee in New York, where it was negotiable, and the maker of which was, before the maturity of the note, summoned as garnishee of the payee. The court there said: "There is no judgment or authoritative *dictum*, to be found in any book, that money due upon such a negotiable instrument can be attached before it is payable; and in point of reason, policy, and usage, as well as upon principles of convenience and equity, we think it would be dangerous and wrong to introduce and establish a precedent of the kind. To adjudge that a note, which passes from hand to hand as cash; on which the holder may institute a suit in his own name; which has all the properties of a bank-note payable to bearer; which would be embraced by a bequest of money; and which is actually in circulation in another State,

[1] Hutchins *v.* Evans, 13 Vermont, 541. This decision was given in 1841, and in the same year the legislature of Vermont passed a statute subjecting *all negotiable paper* to attachment, whether under or over due, unless the same had not only been negotiated, but notice thereof given to the maker or indorser, before the service of trustee process on him. Williams's Compiled Statutes of Vermont, 262; Kimball *v.* Gay, 16 Vermont, 131; Chase *v.* Haughton, Ibid. 594; Barney *v.* Douglass, 19 Ibid. 98. And it is there held, that the indorsee of a negotiable note must give notice to the maker, of the indorsement, to perfect his right and defeat an attachment; and that information of the fact of the indorsement, from a mere stranger to the paper, is not sufficient. Peck *v.* Walton, 25 Vermont, 33. And where a resident of Vermont was garnished, who had executed a negotiable note to a citizen of Massachusetts, payable at a bank in Vermont, he was held to be chargeable, although, by the law of Massachusetts, he could not have been. Emerson *v.* Partridge, 27 Vermont, 8.

should be affected in this way, by a foreign attachment, would be, in effect, to overthrow an essential part of the commercial system, and to annihilate the negotiable quality of all such instruments."[1] Subsequently the Supreme Court of that State somewhat modified this decided position. In 1836, a statute was enacted there, containing the following provision: "From and after the service of such writ . . . all debts and all deposits of money, and all other effects belonging or due to the defendant, by the person or corporation upon which service shall be so made, shall remain attached in the hands of such corporation or person, in the manner heretofore practised and allowed in the case of foreign attachment." In construing this provision, the court considered it broad enough to include debts due by bills of exchange and promissory notes, and that there is nothing in their nature that excludes them from its operation; but admitted that their negotiability renders the hold of an attachment upon them very uncertain; and held, that an attachment is unavailable against a *bona fide* holder, for value, of negotiable paper, who obtains it after attachment, before maturity, and without notice. At the same time the court intimated that the negotiation of such paper by a defendant after he has had notice of the attachment, is a fraud upon the law, and that the court had power to prevent this, by impounding the note, taking care that it should be demanded at maturity, and that proper notice should be given to indorsers, if necessary.[2]

In Maryland, for three quarters of a century, the courts went to greater lengths than any other courts in the country, in sustaining the garnishment of the maker of a negotiable promissory note; not only holding that he might be summoned as garnishee of the payee before the maturity of the note, if the note was, at the time of the garnishment, in the payee's possession;[3] but that, where the maker of such a note is, before its maturity, summoned as garnishee of one who then owns it *as an indorsee*, and judgment is rendered against him, the judgment will protect him against an action on the note, brought by a *subsequent indorsee*, who acquired title to the paper before its maturity, and without knowledge of the attachment.[4] It was quite impossible that so indefensible a doctrine could be permanently held; and

[1] Ludlow *v.* Bingham, 4 Dallas, 47.

[2] Kieffer *v.* Ehler, 18 Penn. State, 388; Hill *v.* Kroft, 29 Ibid. 186; Day *v.* Zimmerman, 68 Ibid. 72; Adams *v.* Avery, 2 Pittsburgh, 77.

[3] Steuart *v.* West, 1 Harris & Johnson, 536.

[4] Somerville *v.* Brown, 5 Gill, 399.

the Court of Appeals of that State, in 1879, without dissent, overruled the previous decisions, and held, that where the maker of a negotiable promissory note is summoned as garnishee of the payee or indorsee, the attaching plaintiff can have no judgment of condemnation, if it appear that the note, either before or after the service of the attachment, had been transferred or indorsed over to a third person before its maturity, for value, and without actual notice to him of the attachment.[1]

In Virginia, though the court declined to decide the general question whether the maker of a negotiable note could, while the note was current, be garnished in a suit against the payee, yet held, that the title of an indorsee, acquired before maturity, without notice of a previous attachment of the note in such a suit, was paramount to the attachment.[2]

In North Carolina, though it is held that debts due by negotiable paper may be attached,[3] yet in order to charge the maker of a negotiable note as garnishee of the payee, it must be shown that the payee had not indorsed the note to some other person before its maturity; for otherwise it does not appear that the maker is indebted to the payee.[4]

In South Carolina, the court refused to charge the maker of a negotiable note, as garnishee of the payee, while the note was current, though the plaintiff offered to give security to indemnify the garnishee against the note. "The probability," said the court, "is so great that the absent debtor may have transferred negotiable notes, that it would be too great a hardship to compel the maker to pay the money, and resort to his indemnity, if he should be compelled to pay it over again."[5]

In Georgia, while it was recognized that the maker of a negotiable instrument may be garnished, yet it was held, that in order to obtain a judgment against him, it must affirmatively appear that the instrument is due, and belonged to the defendant after its maturity and after the time of the garnishment.[6]

In Alabama, in order to reach negotiable paper by garnishment, it must be affirmatively shown that the note had become due, and was still the property of the payee.[7]

[1] Cruett *v.* Jenkins, 53 Maryland, 217. In the report of this case, p. 225, line 3, is a typographical error, as I learned from the clerk of the court: "endorser" should be "endorsee."

[2] Howe *v.* Ould, 28 Grattan, 1.

[3] Skinner *v.* Moore, 2 Devereux & Battle, 138.

[4] Myers *v.* Beeman, 9 Iredell, 116; Ormond *v.* Moye, 11 Ibid. 564; Shuler *v.* Bryson, 65 North Carolina, 201.

[5] Gaffney *v.* Bradford, 2 Bailey, 441.

[6] Mims *v.* West, 38 Georgia, 18; Burton *v.* Wynne, 55 Ibid. 615.

[7] Mayberry *v.* Morris, 62 Alabama, 113.

In Louisiana, it was decided, that the maker of such a note could not be charged before the note became due, whether in his answer he stated that he did not know who held his note, or that he knew the defendant was the owner of it at the time of the garnishment.[1]

In Texas, it was first decided that the maker of a negotiable note *supposed* to have been negotiated, cannot be charged as garnishee of the payee;[2] and afterwards, that he cannot be charged at all, while the note is current as negotiable paper;[3] but may be garnished then; and if the note remains in the hands of the payee till after its maturity, he may be charged in respect thereof.[4]

In Indiana, it was held, that the maker of a note executed and payable in Ohio, and which by the law of Ohio was negotiable, could not be charged as garnishee of the payee, so as to defeat the right of an indorsee, acquiring the note before its maturity.[5] Afterwards the court laid down the broad doctrine, that such maker could not be held as garnishee of the payee, without proof that the note actually remained, *at the time of the trial*, in the hands of the latter, as his property, or in the hands of a fraudulent assignee.[6] Subsequently the court held, that before a judgment can be rendered against the maker, the plaintiff must show that the paper has matured, and that at the *time of maturity* it was held by the defendant, or that it was not in the hands of a third party holding it *bona fide*.[7]

In Wisconsin, the broad ground is taken, that the maker of a negotiable note cannot be held as garnishee of the payee.[8] And so in Michigan,[9] Minnesota,[10] Kentucky,[11] and Florida.[12]

In Iowa, the rule was laid down that the maker of a negotiable instrument cannot be charged as garnishee of the payee, unless the instrument has become due, and is shown to be, at the time

[1] Sheets *v.* Culver, 14 Louisiana, 449; Kimball *v.* Plant, Ibid. 511; Erwin *v.* Com. & R. R. Bank, 3 Louisiana Annual, 186; Denham *v.* Pogue, 20 Ibid. 195.

[2] Wybrants *v.* Rice, 3 Texas, 458.

[3] Iglehart *v.* Moore, 21 Texas, 501; Price *v.* Brady, Ibid. 614; Bassett *v.* Garthwaite, 22 Ibid. 230; Kapp *v.* Teel, 33 Ibid. 311; Willis *v.* Heath, 75 Ibid. 124.

[4] Thompson *v.* Gainesville Nat. Bk., 66 Texas, 156.

[5] Smith *v.* Blatchford, 2 Indiana, 184.

[6] Junction R. R. Co. *v.* Cleneay, 13 Indiana, 161; Stetson *v.* Cleneay, 14 Ibid. 453; Cadwalader *v.* Hartley, 17 Ibid. 520.

[7] Cleneay *v.* Junction R. R. Co., 26 Indiana, 375; King *v.* Vance, 46 Ibid. 246.

[8] Davis *v.* Pawlette, 3 Wisconsin, 300; Carson *v.* Allen, 2 Chandler, 123; 2 Pinney, 457.

[9] Littlefield *v.* Hodge, 6 Michigan, 326.

[10] Hubbard *v.* Williams, 1 Minnesota, 54.

[11] Greer *v.* Powell, 1 Bush, 489.

[12] Huot *v.* Ely, 17 Florida, 775.

of the garnishment, in the possession of the defendant.[1] And so in California.[2]

In Nebraska, the general rule that the maker of a negotiable note is not chargeable as garnishee of the payee, is recognized; but it is held, that if the note was transferred before maturity to an indorsee, voluntarily or fraudulently, for the purpose of protecting the debt from the creditors of the payee, the maker may be garnished while it is in the hands of the indorsee.[3]

§ 589. Against this strong array of reason and authority in favor of protecting negotiable paper from attachment while it is current, there are some cases, to which we will now direct attention. The Supreme Court of Connecticut considered that no doubt existed that a negotiable note, before it has been negotiated, may be attached on a demand against the payee, but that the attachment was *liable to be defeated by the transfer of the note, at any time before it falls due.*[4] The sum of this is, that the garnishment operates only on the slender probability that a defendant, whose circumstances justify an attachment against him, will hold a negotiable note in his possession until after it becomes due, merely to have its proceeds go to the attaching creditor, whom he might have paid without suit. Where, however, the note, in form negotiable, has become due, and is still in the hands of the payee, it was held, in the same State, that a garnishment of the maker, in a suit against the payee, would hold the debt as against a subsequent indorsee who received the note *with notice of the garnishment.*[5]

In New York, the question does not seem ever to have come before the court of last resort until 1882, and then not in connection with the garnishment of the maker of a negotiable promissory note, but with the certification by a bank of a check drawn on it by a depositor. The case was treated as one involving the same principles as if the bank had issued a negotiable promissory note; and the Court of Appeals held, that a debt evidenced by a negotiable security, whether due or not, so long as it is in the hands of the attachment debtor, can be attached by serving the attachment upon the maker of the security; but that the attachment may be defeated by a subsequent transfer of the secur-

[1] Commissioners *v.* Fox, Morris, 48; Wilson *v.* Albright, 2 G. Greene, 125.

[2] Gregory *v.* Higgins, 10 California, 339.

[3] Clough *v.* Buck, 6 Nebraska, 343.

[4] Enos *v.* Tuttle, 3 Conn. 27.

[5] Culver *v.* Parish, 21 Conn. 408.

ity to a *bona fide* taker, for value, who is in a position to enforce it against the maker.[1]

In Tennessee, it is held, that a negotiable note may be attached; but it is also held, that the liability of a garnishee is conclusively settled by his answer; and if he answers that he does not know where the note is, or who holds it, he does not admit indebtedness to the defendant, and cannot be charged, although at the date of the answer the note may be overdue; for it may have been assigned before it fell due. But when the garnishee answers that he was indebted at the time of the garnishment, and it appears that the note *had not been assigned before it was dishonored for non-payment*, he is liable.[2] These views were entertained also in Mississippi.[3]

In Ohio, a debt due the defendant on a negotiable note is subject to garnishment; but if a third party has acquired title to the note before its maturity, under such circumstances that he is a *bona fide* holder, without *actual notice* of the garnishment proceedings, the maker cannot be charged as garnishee of the payee in respect thereof.[4]

In Missouri, it has always been held, that negotiable paper may be attached.[5] In the earliest reported case in that State involving the question, it was decided, that in order to charge the maker of such paper in an action against the payee, the plaintiff must prove that, at the time of the garnishment, the defendant was the holder of the note.[6] The court once went so far as to sanction a judgment against the maker of a negotiable note, though he stated in his answer that he had been informed and believed that the note was assigned, for a valuable consideration, before the garnishment;[7] but in another case, subsequently, it was ruled otherwise.[8] The court expressed themselves sensible of the difficulties that exist in holding that debts evidenced by negotiable paper may be attached in the hands of the payer, particularly as the statute prescribes no mode by which

[1] Bills *v.* Nat. Park Bk., 89 New York, 343.

[2] Huff *v.* Mills, 7 Yerger, 42; Turner *v.* Armstrong, 9 Ibid. 412; Moore *v.* Greene, 4 Humphreys, 299; Daniel *v.* Rawlings, 6 Ibid. 403; Matheny *v.* Hughes, 10 Heiskell, 401.

[3] Yarborough *v.* Thompson, 3 Smedes & Marshall, 291; Thompson *v.* Shelby, Ibid. 296.

[4] Secor *v.* Witter, 39 Ohio State, 218.

[5] Scott *v.* Hill, 3 Missouri, 88; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Ibid. 421; Quarles *v.* Porter, 12 Ibid. 76; Colcord *v.* Daggett, 18 Ibid. 557.

[6] Scott *v.* Hill, 3 Missouri, 88.

[7] Quarles *v.* Porter, 12 Missouri, 76.

[8] Walden *v.* Valiant, 15 Missouri, 409.

an assignee can be brought before the court and have his rights litigated. "But," say the court, "as the judgment is not conclusive against him, unless he has notice and chooses to come in and interplead, he would have a right at any subsequent time, before the money was paid over to the attaching creditor, to arrest the payment, *or, after payment, a right to his action to recover it back.*"[1] This position, however, was afterwards abandoned; the court holding that in such case the assignee cannot sue the attaching creditor, but is confined to his original remedy against his own debtor.[2]

§ 590. In concluding this review of the reported decisions in this country on this important subject, it is proper to remark, that in none of the States where the attachment of negotiable paper has been sustained, are the statutory provisions as to the general scope and effect of an attachment, more comprehensive than in those States where the contrary position is taken. In every State the defendant's *credits* may be attached; and that term is, as to this question, fully as comprehensive as if the statute also authorized — as is frequently the case — the attachment of *rights* or *effects*.

§ 591. It will have been observed that some of the courts whose decisions have been referred to, indicate that an attachment of negotiable paper will prevail against one who acquires title after the attachment, *with notice of it*. If notice is to have this effect, an important question arises as to what will constitute notice. In Pennsylvania, it is considered that the doctrine of implied notice by *lis pendens* is inapplicable to such cases.[3] It can hardly be doubted that the only safe and consistent rule is that the notice must be actual.

§ 592. When one is garnished who holds no relation of debtor to the defendant, except as having, before the garnishment, made a negotiable note to him, he should carefully avoid in his answer any *admission* of indebtedness; for if, in disregard of the rights which may have been already acquired, or which, before the maturity of the note, may be acquired, by indorsees, he

[1] Quarles *v.* Porter, 12 Missouri, 76; Colcord *v.* Daggett, 18 Ibid. 557.

[2] Funkhouser *v.* How, 24 Missouri, 44; Dickey *v.* Fox, Ibid. 217. *Sed contra*, Garrott *v.* Jaffray, 10 Bush, 413.

[3] Kieffer *v.* Ehler, 18 Penn. State, 388.

admit a debt, and be charged in respect thereof, or suffer judgment to go against him, when he could have successfully resisted it, his payment as garnishee will be no protection to him against an action on the note, by one who acquires the same *bona fide*, before its maturity.[1]

[1] Ormond *v.* Moye, 11 Iredell, 564; Brittain *v.* Anderson, 8 Baxter, 316.

CHAPTER XXIX.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY PRE-EXISTING CONTRACTS WITH THE DEFENDANT, OR THIRD PERSONS.

§ 593. It has already been shown that the garnishment proceeding cannot be used to change the nature of an existing contract between the garnishee and the defendant, and to compel the former to pay in money what he had agreed to pay in something else.[1] We have also considered the liability of a garnishee in respect of the defendant's property in his hands, as affected by pre-existing contracts entered into by him in relation thereto.[2] There are oftentimes such contracts in regard to the garnishee's indebtedness to the defendant; and we will now exhibit such cases as refer particularly to that position of affairs between those parties.

§ 594. It is an unquestionable doctrine that the garnishment of a person cannot be permitted to interfere with a contract entered into between him and a third person, with reference to his indebtedness to the defendant. Thus, where A. drew a bill of exchange on B. in favor of C., which was indorsed by C. to D., his factor, and then accepted by B., and afterwards B. was garnished in a suit against C.; it was held, that B.'s acceptance was an express contract to pay D., the factor, and that B. could not, therefore, be held as garnishee of C., the principal.[3] So, where it was agreed between an employer and employee that the wages of the latter should be paid weekly *in advance;* and the employer was summoned as garnishee of the employee, under a statute which gave to garnishment the effect of attaching debts owing by the garnishee "at the time of the service of the garnishment, or which might be owing by him between that time and the time of his filing his answer;" and it appeared that in that time the garnishee had paid the defendant a sum largely exceed-

[1] *Ante*, § 550.
[2] *Ante*, Chapter XXIII.
[3] Van Staphorst *v.* Pearce, 4 Mass. 258.

ing the amount of the attachment; it was held, that the garnishee could not be charged, because under the contract there was never a time when the defendant could have maintained an action against the garnishee.[1] But if the defendant allow the wages to remain uncollected until a debt shall have become due, it would at once become subject to garnishment.[2] So, where A. employed B., at an annual salary of $900, and a short time after the engagement commenced, B. requested that his salary might be paid, as it accrued, to his father, to whom he was indebted; and A., with the approval of the father, agreed so to do; it was held, that A. could not be charged as garnishee of B.[3] So, where the defendant was indebted to the garnishees in the sum of $2000, and agreed to serve them as book-keeper for a year, at a salary of $1500, payable monthly; and that he should receive in money only enough to pay the necessary expenses of his family, and the remainder of his salary was to be applied to the liquidation of his debt; and the garnishees had paid him $500, which was a reasonable sum for his family expenses; it was held, that they could not be charged.[4] The cases thus stated are sufficient for the illustration of the doctrine. For other cases of like import see the note.[5]

§ 595. A question arises here, as to the effect of the Statute of Frauds on verbal contracts entered into by the garnishee, with third persons, and coming within the terms of the statute, and which he sets up in discharge of his liability to the defendant. In Vermont, it has been decided that such contracts cannot be set up by the garnishee, so as to defeat the recourse of the attaching plaintiff against him.[6] This proceeds upon the erro-

[1] Reinhart *v.* Empire Soap Co., 33 Missouri Appeal, 24.

[2] Archer *v.* People's Sav. Bk., 88 Alabama, 249.

[3] Swisher *v.* Fitch, 1 Smedes & Marshall, 541. See White *v.* Richardson, 12 New Hamp. 93; Vincent *v.* Watson, 18 Penn. State, 96; Webber *v.* Bolte, 51 Michigan, 113; Alexander *v.* Pollock, 72 Alabama, 137.

[4] Hall *v.* Magee, 27 Alabama, 414.

[5] White *v.* Richardson, 12 New Hamp. 93; Russell *v.* Convers, 7 New Hamp. 343; Taylor *v.* Burlington & M. R. R. Co., 5 Iowa, 114; Doyle *v.* Gray, 110 Mass. 206; Mason *v.* Ambler, 6 Allen, 124; Watkins *v.* Pope, 38 Georgia, 514; Huntington *v.* Risdon, 43 Iowa, 517; Potter *v.* Cain, 117 Mass. 238; Mines *v.* Pyle, 4 Houston, 646; Callaghan *v.* Pocasset Man. Co., 119 Mass. 173; St. Louis *v.* Regenfuss, 28 Wisconsin, 144; Balliet *v.* Scott, 32 Ibid. 174; McPherson *v.* A. & P. R. Co., 66 Missouri, 103; Godfrey *v.* Macomber, 128 Mass. 188; Whiting *v.* Earle, 3 Pick. 201; Manchester *v.* Smith, 12 Ibid. 113; Bray *v.* Wheeler, 29 Vermont, 514; Baker *v.* Eglin, 11 Oregon, 333; Mansfield *v.* Stevens, 31 Minnesota, 40; North Star B. & S. Co. *v.* Ladd, 32 Ibid. 861; Coykendall *v.* Ladd, Ibid. 529.

[6] Hazeltine *v.* Page, 4 Vermont, 49; Strong *v.* Mitchell, 19 Ibid. 644.

neous idea, that a verbal contract coming within the terms of the statute is absolutely void; but the better view doubtless is that taken by the Supreme Court of Massachusetts, holding the contract not absolutely void *per se*, but that no action can be maintained on it, if the party sought to be charged plead the statute, and that the privilege of pleading it is a personal one, and may be waived, if the party choose. Therefore, where the defendant kept a boarding-house for the workmen employed in the garnishee's manufactory, and the garnishee became indebted to the defendant for their board; but, when the defendant began to keep the house, it was verbally agreed between the defendant, the garnishee, and several third persons, who subsequently furnished her with provisions and other supplies, that the supplies should be delivered and charged to the defendant, and that at the end of each quarter the garnishee would see that the persons who furnished them were paid; the court held, that whatever the garnishee was liable for on this guaranty must go to discharge his debt to the defendant, and that the garnishee, though his undertaking was within the statute, was not bound, against his own choice, to set up that statute in order to avoid his promise.[1]

§ 596. But where a garnishee relies on a contract with a third person, as affecting his liability to the defendant, it must appear that such third person stood in such position as to have a legal right to enter into the contract, and that it was entered into with the defendant's assent; otherwise it will be unavailing. Thus, where A. disclosed, as garnishee, that he had executed a note to B., the defendant, which was transferred by B. to C., as collateral security for a debt due to C.; and, before the garnishment, A. paid C. a part of the note, and C. thereupon, without B.'s knowledge, released him from any further claim upon it; it was held, that C. had no legal right to discharge A. from liability for the balance, without B.'s assent, and A. was accordingly charged as garnishee in respect thereof.[2]

§ 597. Where the garnishee is indebted, it will not vary his liability that his contract with the defendant is to pay the money in another State or country than that in which the attachment is pending. Thus, where it was urged as a ground for discharging a garnishee, that his debt to the defendant was contracted in

[1] Cahill *v.* Bigelow, 18 Pick. 369; Swett *v.* Ordway, 23 Ibid. 266.

[2] Wiggin *v.* Lewis, 19 New Hamp. 548.

England, and was payable there only, so that the defendant could not, and therefore the plaintiff could not, make it payable elsewhere, the court said: "We do not perceive any legal principle upon which the objection rests. This was a debt from the garnishee everywhere, in whatever country his person or property might be found. A suit might have been maintained by the defendant here, and therefore the debt may be attached here."[1] So, where the debt was contracted where the garnishment took place, but the garnishee agreed to pay the money in another State, he was nevertheless charged; the court referring to the case just cited as sustaining their decision.[2] And in Iowa a garnishee of a defendant residing in Nebraska was charged, though his debt was contracted and was payable in the latter State, and was there exempt by law from attachment or execution.[3]

[1] Blake *v.* Williams, 6 Pick. 286. See Mooney *v.* U. P. R. Co., 53 Iowa, 346.

[2] Sturtevant *v.* Robinson, 18 Pick. 175. See Commercial Nat. Bank *v.* C. M. & St. P. R. Co., 45 Wisconsin, 172; East Tenn. Va. & Ga. R. R. Co. *v.* Kennedy, 33 Alabama, 462.

[3] Leiber *v.* U. P. R. Co., 49 Iowa, 688.

CHAPTER XXX.

THE GARNISHEE'S LIABILITY AS AFFECTED BY A FRAUDULENT ATTEMPT BY THE DEFENDANT TO DEFEAT THE PAYMENT OF HIS DEBTS.

§ 598. CASES have arisen, in which a person indebted has sought to prevent his effects from being reached for the payment of his debts, by selling property, and taking promissory notes therefor payable to third persons, in the expectation that such notes could not be reached by garnishment. All such attempts, being in fraud of just creditors, have been discountenanced wherever made, and, if the circumstances permitted, without violating established legal principles, have been defeated.

§ 599. Thus, in Vermont, it appeared from the answer of the garnishee that he had been indebted to the defendant; that the defendant said to him he was afraid his creditors would attach the debt, and desired the garnishee to give notes payable to a third person, which was done, without the concurrence or knowledge of the third person. The court said: "We could not feel justified to allow so obvious a subterfuge to interpose any obstacle in the way of this process. If the person to whom the note is payable is now the *bona fide* holder of this note, and received it in the due course of business, while it was still current, the interest thus acquired cannot be defeated by this process, although pending at the time the holder acquired a title to it. But if the holder took the note when overdue, he took it subject to all the defences which existed while the note was in the hands of the defendant. Among such defences may be reckoned attachment by this process."[1] So, in New Hampshire, where A. sold property to B., and unnegotiable notes therefor were executed to C., a resident in another State, who was unknown to B.; and A., at the time of selling the property and taking the notes, said he was owing some debts that he never meant to pay,

[1] Camp *v.* Clark, 14 Vermont, 387. *v.* Davis, 24 Vermont, 363; Kealer *v.* St. See Bibb *v.* Smith, 1 Dana, 580; Marsh John, 22 Iowa, 565.

and some that he would pay when he was ready; the court held the transaction fraudulent as to A.'s creditors, and charged B. as his garnishee.[1] So, in Connecticut, where A., with a view to keep his property out of the reach of his creditors, and in pursuance of a combination with B. for that purpose, sold goods belonging to him as the property of B., and took from the vendee a negotiable note, payable to B. at a future day, which B. assigned, before it became due, to C., who was acquainted with the transaction; it was held, that the vendee was the debtor of A., and was therefore liable as his garnishee.[2] So, where a husband traded a manufacturing establishment belonging to himself and partner, for a tract of land, taking the conveyance of the land to his wife to defraud creditors; and afterwards sold the land and took a note for the unpaid price, to his wife; which remained in her hands until after its maturity, and until the maker was garnished by a creditor of the firm of which the husband had been a member; it was held, that as there were involved no rights of innocent assignees of the note, the amount thereof was subject to the garnishment.[3]

§ 600. In Massachusetts this case arose. A. collected in New York, a sum of money for B. in Boston, and had it, on his return to the latter place, in a thousand-dollar bill. Seeing B., he informed him that he had the money in that shape, and would then have paid B. the amount due him, if the bill could have been changed. As that could not then be done, B. requested A. to give him his negotiable note for the amount due him; in respect of which, by the law of Massachusetts, A. could not be charged as garnishee of B. The note was given, and immediately afterward A. was garnished. Facts in the case tended to show that the note was given for the purpose of preventing the amount collected by A. from being reached by the creditors of B., by garnishment; and it was therefore contended that A. was still the debtor of B., and therefore liable; but the court held the note to be a payment *pro tanto*, and that the garnishee was not chargeable.[4] A similar case came up in Texas, with similar result, the court saying: "If the maker of a promissory note may be charged in garnishment before its maturity, on the ground that he knew when he executed it that it was the purpose of the payee to place the fund beyond the reach of his creditors,

[1] Green *v.* Doughty, 6 New Hamp. 572.
[2] Enos *v.* Tuttle, 3 Conn. 27. See Price *v.* Bradford, 4 Louisiana, 35.
[3] Patton *v.* Gates, 67 Illinois, 164.
[4] Wood *v.* Bodwell, 12 Pick. 268.

we see no reason why one who pays a debt, with a knowledge of a like intent on the part of his creditor, may not be compelled to pay again at the suit of the creditors of him to whom he made the payment." [1]

§ 601. In all cases where one indebted to another gives an obligation to pay the debt to a third person, it may be considered as a sound rule, that, in order to make such obligation effectual to defeat an attachment of the debt, as due to the original creditor, it must be shown that the obligation to the third person was *bona fide* and upon adequate consideration.[2] If the debtor give such an obligation in good faith, not knowing of any fraudulent intent in the other parties, and pay the obligation in the hands of an assignee, he cannot be charged as garnishee of him to whom the debt was primarily owing.[3]

§ 601 *a*. In Arkansas, a man sold property and gave the purchase-money to his wife, who deposited it in a bank, in her own name; and the bank was summoned as garnishee of the husband. It was attempted to be shown that the money was, in fact, the husband's, and that its deposit in his wife's name was a fraud on his creditors; but the court held, that the question whether the gift to the wife was fraudulent could not be tried in the garnishment proceeding.[4] A different view was entertained in Massachusetts, where a sick person handed to a servant a sum of money, and said: "You take this money. When I die, bury me, and keep the rest, because you are the only woman who has ever been kind to me;" and the donor then died, leaving debts, and her administrator could find no estate. A creditor, in an action against the administrator, summoned the donee as garnishee, and the donee was charged for so much of the gift as had not been expended for the expenses of the decedent's illness and burial, on the ground that the gift was plainly void in point of law.[5]

[1] Willis *v.* Heath, 75 Texas, 124.
[2] Langley *v.* Berry, 14 New Hamp. 82.
[3] Diefendorf *v.* Oliver, 8 Kansas, 365.
[4] Himstedt *v.* German Bank, 46 Arkansas, 537.
[5] Harmon *v.* Osgood, 151 Mass. 501.

CHAPTER XXXI.

THE GARNISHEE'S LIABILITY AS AFFECTED BY AN EQUITABLE ASSIGNMENT OF THE DEBT.

§ 602. We have previously seen[1] that an equitable assignment of personal property of a defendant in the hands of a garnishee, will relieve the latter from liability as garnishee on account of such property. We come now to the application of the same principle to a debt due from the garnishee to the defendant. When it is sought to reach by garnishment a credit of the defendant, it must be both legally and equitably due him.[2]

§ 603. The doctrine which establishes the assignability in equity of *choses in action*, arises from the public utility of increasing the quantity of transferable property, in aid of commerce and of private credit.[3] It is a well-known rule of the common law, that no possibility, right, title, or thing in action, can be granted to third persons. Hence, a debt, or other *chose in action*, could not be transferred by assignment, except in case of the king; to whom and by whom at the common law an assignment of a *chose in action* could always be made; for the policy of the rule was not supposed to apply to the king. So strictly was this doctrine construed, that it was even doubted whether an annuity was assignable, although assigns were mentioned in the deed creating it. And at law, with the exception of negotiable instruments and some few other securities, this still continues to be the general rule, unless the debtor assents to the transfer; but if he does assent, then the right of the assignee is complete at law, so that he may maintain a direct action against the debtor, upon the implied promise to pay him the same, which results from such assent. But courts of equity have long since totally disregarded this nicety. They accordingly give effect to assignments of *choses in action*. Every such assignment is considered in equity as in its nature amounting to a declara-

[1] *Ante*, Chapter XXIV.

[2] Rodgers *v.* Hendsley, 2 Louisiana, 597; Kaley *v.* Abbott, 14 New Hamp. 359; Leland *v.* Sabin, 7 Foster, 74; Cram *v.* Shackleton, 64 New Hamp. 44.

[3] Dix *v.* Cobb, 4 Mass. 508.

tion of trust, and to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt, or to reduce the property into possession.[1]

§ 604. Hence, where it appears that a debt due from the garnishee to the defendant had been equitably assigned before the garnishment, the court will take cognizance of the assignment and protect the rights of the assignee. For, as the defendant has parted with his interest in the debt, and can no longer maintain an action for it against the garnishee, for his own benefit; and as the plaintiff can acquire no greater interest in the debt than the defendant had at the time of the garnishment; it results that the garnishee cannot be charged for that which, equitably, he has ceased to owe to the defendant, and owes to another person.

The extent to which courts will protect the rights of parties under equitable assignments, is illustrated by the following case: A. made a contract with B. in relation to some wool, the effect of which was, that A. still retained an interest in the same, during the process of manufacturing it. B. agreed to effect an insurance on the wool for the benefit of A., and procured a policy in his own name, in pursuance of that agreement, and for that object. After the making of the policy, and before a loss under it, B. informed A. that he had effected an insurance for A.'s benefit, pursuant to the previous stipulation. Afterward the wool was destroyed by fire, and the insurance company was summoned as garnishee of B.; and A. became a party to the suit, claiming the insurance money under his arrangement with B. It was held, that A. had an equitable interest in the policy, equivalent to that of an assignee of a *chose in action*, and sufficient to enable him to hold the avails of the same as against the attaching creditor.[2]

§ 604 *a*. Not only will courts protect equitable assignees, but they will afford remedy against a party who, having notice of

[1] 2 Story's Equity, §§ 1039, 1040.

[2] Providence County Bank *v.* Benson, 24 Pick. 204. See Green *v.* Gillett, 5 Day, 485; Lamkin *v.* Phillips, 9 Porter, 98; Hodson *v.* McConnell, 12 Illinois, 170; Galena & Chicago U. R. R. Co. *v.* Menzies, 26 Ibid. 121; Carr *v.* Waugh, 28 Ibid. 418; Cairo & St. L. R. R. Co. *v.* Killenberg, 82 Ibid. 295; Whitten *v.* Little, Georgia Decisions, Part II. 99; Forepaugh *v.* Appold, 17 B. Monroe, 625; Patten *v.* Wilson, 34 Penn. State, 299; Insurance Co. of Penn. *v.* Phœnix Ins. Co., 71 Ibid. 31; Burrows *v.* Glover, 106 Mass. 324; Norton *v* Piscataqua Ins. Co., 111 Ibid 532; Taft *v.* Bowker, 132 Ibid. 277; Davis *v.* Carson, 69 Missouri, 609; Sheldon *v.* Hinton, 6 Bradwell, 216; Horn *v.* Booth, 22 Illinois Appellate, 385.

an assignment of the debt, yet subjects the debtor, through garnishment, in a suit against the assignor, to the payment of a debt. In such a case the Supreme Court of Tennessee sustained a bill in equity by the assignee against the attaching plaintiff, and decreed the payment by him to the assignee of the money recovered through the garnishment.[1]

§ 605. As a general rule, personal property has, in contemplation of law, no locality or *situs*, but is deemed to follow the person of the owner. Hence it results, that a voluntary transfer or alienation is governed by the law of the place of his domicile. It is also a general principle, sanctioned and acted on in all civilized countries, that the laws of one country will, by what is termed the comity of nations, be recognized and executed in another where the rights of individuals are concerned. Therefore, the law of the place where a personal contract is made, is to govern in deciding upon its validity or invalidity; and a conveyance of personal property which is valid by that law, is equally effectual elsewhere. These principles apply to debts and other *choses in action*, as well as to any other species of personal property. While the rule that the law of one nation will be carried into effect in the territories of another, is subject to some exceptions, yet as a general rule it is established, and has an application to the subject now under discussion, in connection with an assignment of a debt in one State, in such a manner as to be effectual by the laws of that State, but which is wanting in some particular to make it so in another State, where the debtor resides. In such case the assignment will be sustained as against an attaching creditor, residing in the State where the assignment was made;[2] and also against one residing in the State where the debt, or *chose in action*, is.[3]

§ 606. In order, however, that the rights of the assignee should be fully protected, it is important that he immediately notify the debtor of the assignment. Though the assignment, as between the parties to it, is complete and effectual from the moment it is made, and the assignor, if he afterward receive

[1] Haynes *v.* Gates, 2 Head, 593.

[2] Van Buskirk *v.* Hartford Fire Ins. Co., 14 Conn. 583; Burlock *v.* Taylor, 16 Pick. 335; Whipple *v.* Thayer, Ibid. 25; Daniels *v.* Willard, Ibid. 36; Martin *v.* Potter, 11 Gray, 37; Noble *v.* Smith, 6 Rhode Island, 446; Northam *v.* Cartwright, 10 Ibid. 19; Russell *v.* Tunno, 11 Richardson, 303.

[3] Houston *v.* Nowland, 7 Gill & Johnson, 480; Wilson *v.* Carson, 12 Maryland, 54; Mowrey *v.* Crocker, 6 Wisconsin, 326; Princeton Man. Co. *v.* White, 68 Georgia, 96.

payment of the debt, will be obliged to pay the amount to the assignee, yet the debtor is under no obligation to pay the assignee until he receive notice of the assignment. After that, a payment to the assignor will be at the debtor's peril.

§ 607. The assignment of a debt evidenced by bond, bill, or note is complete by the assignment of the bond, bill, or note, without notice to the debtor; but as to *choses in action* not so evidenced, such, for example, as book accounts, or debts due by judgment, in order to a valid assignment of them, as against an attaching creditor, there must be notice to the debtor. If, therefore, one indebted in such form be summoned as garnishee of his creditor, and have received no notice of an assignment of his debt, a judgment rendered against him as garnishee will protect him from subsequent liability to an assignee.[1] If he have received information of an assignment, it is his duty, in answering, to state that fact, so as to guard the rights of the assignee, but more especially his own; for if he fail to do so, and judgment go against him as a debtor of the assignor, it will afford him no protection against a suit by, and a second payment to, the assignee.[2] The particular shape in which this information may have been received is of no consequence, provided it be shown to have been derived from the assignee or his agent.[3] And it is no part of the garnishee's duty (except, perhaps, in those New England States where facts stated in the garnishee's answer are regarded, only so far as he may declare his belief of their truth) to ascertain the truth or falsity of the information, before he determines whether he will state it in his answer. True or false, it should be stated in every case, whether the answer is in itself conclusive, or may be controverted and disproved. For if the answer be conclusive, and the garnishee fails to state

[1] Woodbridge *v.* Perkins, 3 Day, 364; Richards *v.* Griggs, 16 Missouri, 416; Clodfelter *v.* Cox, 1 Sneed, 330, McCoid *v.* Beatty, 12 Iowa, 299; Dodd *v.* Brott, 1 Minnesota, 270; Penniman *v.* Smith, 5 Lea, 130; Robertson *v.* Baker, 10 Ibid. 300.

[2] Nugent *v.* Opdyke, 9 Robinson (La.), 453; Colvin *v.* Rich, 3 Porter, 175; Lamkin *v.* Phillips, 9 Ibid. 98; Foster *v.* White, Ibid. 221; Crayton *v.* Clark, 11 Alabama, 787; Fowler *v.* Williamson, 52 Ibid. 16; Pitts *v.* Mower, 18 Maine, 361; Bunker *v.* Gilmore, 40 Ibid. 88; Walters *v.* Washington Ins. Co., 1 Iowa, 404; Large *v.* Moore, 17 Ibid. 258; Prescott *v.* Hull, 17 Johns. 284; Kimbrough *v.* Davis, 34 Alabama, 583; Page *v.* Thompson, 43 New Hamp. 373; Phipps *v.* Risley, 15 Oregon, 494; Coleman *v.* Scott, 27 Nebraska, 77.

[3] Bank of St. Mary *v.* Morton, 12 Robinson (La.), 409. In Vermont, it was held, that the fact that the information came to the garnishee on a Sunday did not make it less effective than if it had come on any other day. Crozier *v.* Shants, 43 Vermont, 478.

the information he has received, because he may not believe it to be true, he assumes all the responsibility of the correctness of his belief, not only as to the facts within his knowledge, but as to other facts, of the existence of which he may be ignorant, and which might show his information to be true. And if the answer be not in itself conclusive, but may be controverted and disproved, he should not prejudge the case, and decide that the information is untrue; but should leave the plaintiff to deny, and the court to adjudicate its truth.[1]

§ 607 *a*. The obligation of the garnishee to state in his answer the fact of his having received information of an assignment of the debt is not dispensed with by the fact that the assignee knew of the garnishment, and might have intervened and asserted his right to the money.[2]

§ 608. An assignment of a debt will protect the rights of the assignee from a subsequent attachment against the assignor, though no notice may have been given to the debtor before the attachment, if it be given in time to enable him to take advantage of it before judgment against him as garnishee.[3] And it is his duty at any time before such judgment, to make such notice known to the court; failing in which, the judgment will avail him nothing as a defence against an action by an assignee of the debt.[4]

§ 609. An assignment of a debt is usually made in writing, but this formality is not necessary where the debt is evidenced by a writing; a delivery of which to the assignee for a valuable consideration will operate an assignment, so far as to enable him to maintain an action upon it in the name of the assignor.[5]

[1] Foster *v.* Walker, 2 Alabama, 177; Wicks *v.* Branch Bank, 12 Ibid. 594.

[2] Large *v.* Moore, 17 Iowa, 258.

[3] Dix *v.* Cobb, 4 Mass. 508; Stevens *v.* Stevens, 1 Ashmead, 190; Pellman *v.* Hart, 1 Penn. State, 263; Crayton *v.* Clark, 11 Alabama, 787; Smith *v.* Sterritt, 24 Missouri, 260; Walters *v.* Washington Ins. Co., 1 Iowa, 404; Muir *v.* Schenck, 3 Hill (N. Y.), 228; Northam *v.* Cartwright, 10 Rhode Island, 19; Tracy *v.* McGarty, 12 Ibid. 168; Tiernay *v.* McGarity, 14 Ibid. 231; Lee *v.* Robinson, 15 Ibid. 369; Williams *v.* Pomeroy, 27 Minnesota, 85; Ives *v.* Addison, 39 Kansas, 172. That the doctrine stated in the text is correct, cannot, I think, be reasonably doubted; but in Connecticut and Vermont, it is held, that an attachment of a debt, made before notice of its assignment, will prevail against the assignment, though notice be given to the debtor before judgment against him as garnishee. Judah *v.* Judd, 5 Day, 534; Bishop *v.* Holcombe, 10 Conn. 444; Van Buskirk *v.* Hartford F. I. Co., 14 Ibid. 141; Ward *v.* Morrison, 25 Vermont, 593.

[4] Crayton *v.* Clark, 11 Alabama, 787.

[5] King *v.* Murphy, 1 Stewart, 228; Bayley on Bills, 2d Am. Ed. 102; Norton *v.* Piscataqua Ins. Co., 111 Mass 532.

Wherever, therefore, a writing given by a garnishee to the defendant has been *bona fide* transferred by delivery to a third person, the garnishee cannot be charged. Thus, where the evidence of the garnishee's indebtedness consisted of a certificate of a certain amount of lumber cut for him by the defendant, with a statement of what was to be paid for it, attested by third persons; and before the garnishment this certificate was assigned by delivery; the court held the assignment good, and discharged the garnishee.[1] So, where a lessor delivered to his creditor a lease, on which rent was due, to enable him to receive the same in part payment of the lessor's debt to him, and the lessee knew of the delivery for that purpose, and agreed to account to the creditor for the rent due; it was held a good equitable assignment of the rent as against an attaching creditor of the lessor.[2] So, where a railroad company issued to an employee a certificate of indebtedness, which the employee endorsed and sold; it was held, that the company could not be charged as garnishee of the employee under an attachment served after the sale of the certificate.[3]

§ 610. It is, however, impracticable thus to transfer by delivery a book account or other debt, not evidenced by writing. As a symbolical delivery of personal property, so situated that an actual delivery of it could not be made, has been regarded as sufficient, so the assignee of a judgment, or of a book debt, may, upon the same principle, be enabled to establish his rights without proof of an actual delivery. For a delivery of a transcript of them would not prove a delivery of the debt or judgment. It would only prove a delivery of something indicative of their existence and of the intention of the parties. Other evidence, showing that the transfer had been completed, would be sufficient.[4] In all such cases the assignment should, for greater certainty, be written; though, as we shall presently see,[5] a verbal assignment, if assented to by the debtor, will suffice.

An assignment of a *chose in action*, or of a fund, need not be by any particular form of words, or particular form of instrument. Any binding appropriation of it to a particular use, by any writing whatever, is an assignment, or what is the same, a transfer of the ownership. Thus, a power of attorney to collect moneys and pay them over to certain named parties, was held,

[1] Littlefield *v.* Smith, 17 Maine, 327. See Hardy *v.* Colby, 42 Ibid. 381; Byars *v.* Griffin, 31 Mississippi, 603.

[2] Dennis *v.* Twitchell, 10 Metcalf, 180.

[3] Cairo & St. Louis R. R. Co. *v.* Killenberg, 82 Illinois, 295.

[4] Porter *v.* Bullard, 26 Maine, 448.

[5] *Post*, § 614.

as soon as the moneys were collected, to be in effect an assignment.[1] So, a power of attorney, irrevocable, authorizing the attorney to collect a sum of money, to his own use, is a constructive assignment of the money to him.[2] So, a power of attorney to receive all the money due from A. to the constituent, and to give a discharge therefor in the constituent's name, with a clause stating that this "is an assignment of the same," constitutes an assignment of the debt to the attorney, though the power is not in terms irrevocable, and does not expressly authorize the attorney to receive the money to his own use.[3] So, where a garnishee disclosed indebtedness to the defendant, but stated that the defendant had drawn an order on him to pay the balance of his account to a third person; and it was objected that this was no assignment, because it did not purport to be for value received, and because it did not appear but that the drawee named in the order was the servant of the defendant, to receive the money for the defendant's use; it was held, that there was a *prima facie* assignment, and that the words *value received* were not necessary.[4] So, where A. was indebted to B. on a book account, and B. drew out a bill of the items, and wrote at the bottom a request to A. to pay the amount to C.; and notice of the assignment was given to A.; and afterwards A. was garnished in a suit against B., and was charged as garnishee, and paid the money; and suit was then brought in B.'s name, for the use of C., to recover the money; it was held, that the order, being drawn for the whole amount due, was an assignment of the debt, and that A. was bound to know that an assignment was intended.[5]

§ 611. It is not, however, every order which may be drawn on a party having moneys of, or indebted to, the drawer, which will operate an assignment of the money or debt. A bill of exchange, for instance, is not an assignment of the fund on which it is drawn, or any part thereof, until accepted by the drawee.[6] If, however, an order be drawn for the *whole* of a

[1] Watson *v.* Bagaley, 12 Penn. State, 164.

[2] Gerrish *v.* Sweetser, 4 Pick. 374.

[3] Weed *v.* Jewett, 2 Metcalf, 608. See People *v.* Tioga C. P., 19 Wendell, 73.

[4] Adams *v.* Robinson, 1 Pick. 461. See Johnson *v.* Thayer, 17 Maine, 401.

[5] Robbins *v.* Bacon, 3 Maine, 346; Conway *v.* Cutting, 51 New Hamp. 407.

[6] Mandeville *v.* Welch, 5 Wheaton, 277; Cowperthwaite *v.* Sheffield, 1 Sandford Sup. Ct. 416; 3 Comstock, 243; Sands *v.* Matthews, 27 Alabama, 399; Luff *v.* Pope, 5 Hill (N. Y.), 413; 7 Ibid. 577; Winter *v.* Drury, 1 Selden, 525; Kimball *v.* Donald, 20 Missouri, 577; Wilson *v.* Carson, 12 Maryland, 54; Hemphill *v.* Yerkes, 132 Penn. State, 545; Baer *v.* English, 84 Georgia, 403.

designated fund in the hands of a drawee, it is an assignment, whether accepted by the latter or not;[1] but it is well settled that where an order is drawn on either a general or a particular fund, *for a part only*, it does not amount to an assignment of that part, unless the drawee consent to the appropriation by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties as a part of their contract.[2] Therefore, where A., under an attachment against B., summoned a bank as garnishee, which, at the time, had money of B. on deposit, and after the garnishment, A., B., and the cashier of the bank being together at a place distant from the bank, B. drew a check on the bank for a certain sum, and delivered it to A., in payment of his debt to A., and A. receipted for it, and signed an order to dismiss his attachment, upon the amount of the check being transferred to his credit on the books of the bank, and delivered the check to the cashier for the purpose of having the transfer made when he should return to the bank; and, before his return, other creditors of B. had garnished the bank; but, notwithstanding, the cashier charged the check to B.'s account and carried the same amount to the credit of A.; it was held, that the check was no assignment of any part of B.'s money in the bank, until it was presented and paid, and that the subsequent attachers were entitled to the money, notwithstanding the entries made on the books of the bank.[3] And in New York, in a similar case, it was held, that a check on a bank is a bill of exchange payable on demand, the drawee of which owes no duty to the holder until the check is presented and accepted; and that the fact that a clerk of the bank told the payee of the check that it "was in order and would be paid;" in consequence of which the holder, without requiring a written acceptance, took the check away and deposited it in his own bank, did not transfer the amount of the check to the holder so as to defeat an attachment served on the bank before the check was presented

[1] McMenomy *v.* Ferrers, 3 Johnson, 71; Miller *v.* Hubbard, 4 Cranch C. C. 451; Macomber *v.* Doane, 2 Allen, 541; Kingman *v.* Perkins, 105 Mass. 111; Garland *v.* Harrington, 51 New Hamp. 409; Barcroft *v.* Denny, 5 Houston, 9; Lee *v.* Robinson, 15 Rhode Island, 369.

[2] Poydras *v.* Delaware, 13 Louisiana, 98; Mandeville *v.* Welch, 5 Wheaton, 277; Cowperthwaite *v.* Sheffield, 1 Sandford Sup. Ct. 416; 3 Comstock, 243; Gibson *v.* Cooke, 20 Pick. 15; Tripp *v.* Brownell, 12 Cushing, 376; Holbrook *v.* Payne, 151 Mass. 383; Chapman *v.* White, 2 Selden, 412; Rice *v.* Dudley, 34 Missouri Appeal, 383.

[3] Bullard *v.* Randall, 1 Gray, 605. See Imboden *v.* Perrie, 13 Lea, 504; Attorney-General *v.* Continental L. I. Co., 71 New York, 325; Lunt *v.* Bank of N. America, 49 Barbour, 221.

for payment.[1] And where a bank certifies a check, and after doing so an attachment against the depositor is served on it, whether the fact of its certification of the check will protect the fund from the attachment will depend on whether the check had, *before the service of the attachment*, reached the hands of a *bona fide* holder for value. If it had, the attachment will not hold the fund; but if it appear that the fund, though transferred on the books of the bank to the credit of the holder of the check, was in reality for the benefit of the drawer of the check, the attachment will be effectual.[2]

§ 612. It is not necessary that the debt assigned should be due at the time of the assignment, in order to protect the rights of the assignee from an attachment against the assignor. A debt afterwards to accrue may be effectually assigned. Thus, where A. was employed as a laborer by B., and being indebted to C., executed a power of attorney authorizing C. to receive and receipt for all sums of money then due or thereafter to become due to him, and stating that the power was an assignment of the money; and B. agreed to pay A.'s wages to C.; it was decided that the assignment was valid, and that B. could not be held as garnishee of A.[3] So, where A. was employed as an assessor of the city of Mobile, and before the service required of him in that capacity had been performed, he drew an order on the corporation in favor of B. for the agreed compensation for his services, which was accepted by the mayor of the city; it was decided that the assignment of the debt was complete, and that the corporation could not be held as garnishee of A.[4] But where A., being indebted to G. H. P. & Co. gave an order on his employer to pay to them all wages due him at the date of the order, or thereafter becoming due to him; and the employer accepted the order in writing; and thereafter the debt to G. H. P. & Co. was paid; and there were changes in the membership of that firm; and there was a verbal agreement between A. and them that the

[1] Duncan *v.* Berlin, 60 New York, 151.

[2] Gibson *v.* Nat. Park Bank, 49 New York Superior Ct. 429.

[3] Weed *v.* Jewett, 2 Metcalf, 608. See Emery *v.* Lawrence, 8 Cushing, 151; Hartley *v.* Tapley, 2 Gray, 565; Taylor *v.* Lynch, 5 Ibid. 49; Lannan *v.* Smith, 7 Ibid. 150; Wallace *v.* Walter Haywood C. Co., 16 Ibid. 209; Cahill *v.* Bigelow, 18 Pick. 369; Van Staphorst *v.* Pearce, 4 Mass. 258; Johnson *v.* Pace, 78 Illinois, 143; Wade *v.* Bessey, 76 Maine, 413; Tiernay *v.* McGarity, 14 Rhode Island, 231; Lewis *v.* Commissioners, 14 Colorado, 371.

[4] Payne *v.* Mobile, 4 Alabama, 333. See Tucker *v.* Marsteller, 1 Cranch C. C. 254; Garland *v.* Harrington, 51 New Hamp. 409; Kane *v.* Clough, 36 Michigan, 436.

order should continue in force; but no notice of this agreement was given to A.'s employer; it was held, that this agreement was inoperative to transfer the legal title as against attaching creditors.[1]

§ 613. But while it is true that a debt to become afterwards due may be assigned, it is necessary that, at the date of the assignment, the contract out of which the debt is to grow should have some existence. A mere possibility of future indebtedness, without any subsisting engagement upon which it shall accrue, cannot be assigned.[2] The debt may be conditional, uncertain as to amount, or contingent; but to be the subject of an assignment, there must be an actual or possible debt due, or to become due. Therefore where A. executed a paper in July, purporting to transfer to B. "all claims and demands which A. now has or which he may have against C. on the first day of January next, for all sums of money due and to become due to A. for services in laying common sewers;" with a power of attorney irrevocable to receive the same; and it was altogether uncertain whether C. would afterwards employ A. at all; and the existence of any debt from him to A. after the date of the assignment depended wholly on A.'s being so employed; it was decided that the transfer to B., as against a subsequent attaching creditor, carried only what was due at its date, and did not reach anything becoming due to A. afterwards, from subsequent employment.[3]

§ 614. When a debt is not evidenced by a writing, it may be assigned verbally, if the debtor assent. Where such assent is given, the assignment is complete, and the debtor is bound to pay to the assignee, and consequently cannot be charged as garnishee of the assignor. Thus where the answer of a garnishee admitted that he had been indebted to the defendant, but stated that before he was garnished there was a verbal agreement between him and the defendant and a creditor of the defendant, that the debt should be paid to the creditor; the answer was held to be evidence in the garnishee's favor to show that he was not indebted to the defendant. This was in effect giving to the arrangement the character and force of an equitable assign-

[1] Adams *v.* Willimantic Linen Co., 46 Conn. 320.

[2] Runnells *v.* Bosquet, 60 New Hamp. 38.

[3] Mulhall *v.* Quinn, 1 Gray, 105. See Herbert *v.* Bronson, 125 Mass. 475; Egan *v.* Luby, 133 Ibid. 543.

ment of the debt; otherwise the answer was inadmissible as evidence to the purport stated.[1] So, where A. & B. were partners, and upon a dissolution of the firm, A. was found indebted to B., and B. requested him to pay the amount to C., his creditor, who was present, and A. replied that it was immaterial to him to whom he paid the money; it was held to be a transfer of the debt, so as to prevent A. from being charged as garnishee of B.[2] So, if by agreement between both the partners and a debtor of the firm, the debt of the latter is to be paid to one of the partners after a dissolution of the firm, the debtor may be held as garnishee of him to whom it is so to be paid.[3]

§ 615. In any case of the transfer of evidences of debt, where the assignee undertakes to assert title through such transfer, the good faith of the transaction may, of course, be the subject of inquiry, and must be shown, if sufficient evidence be presented to cast suspicion upon it. The assignee will, in such case, be entitled, in the first instance, to the benefit of all presumptions in his favor, but those presumptions may be overthrown by proof, as in any other transaction. If the assignment be direct from the debtor to him, and made without consideration, or with a fraudulent intent, known to the assignee, he cannot avail himself of it to defeat an attachment. And the infirmity of the transaction will affect the title of a subsequent purchaser, having knowledge of the fraudulent character of the original assignment. But no such result will ensue where the subsequent purchaser has not such knowledge. He may know that the debtor transferred the paper without consideration, but that will not prevent his acquiring, for value, a complete title; for such transfer is not necessarily fraudulent *per se;* and the purchaser is not bound to inquire into the solvency of the assignor, or into the circumstances which might give a fraudulent aspect to the transaction. Thus, where A., who was insolvent, transferred to B., as a gift, a check on a bank, and B. for value sold the check to C., who knew that B.'s title was that of a donee without consideration, but had no knowledge that the gift was in fraud of A.'s creditors; it was held, that C.'s title was valid and effect-

[1] Black *v.* Paul, 10 Missouri, 103. See Curle *v.* St. Louis Perpetual Ins. Co., 12 Ibid. 578; Porter *v.* Bullard, 26 Maine, 448; Rudd *v.* Paine, 2 Cranch C. C. 9; Newby *v.* Hill, 2 Metcalfe (Ky.), 530; Noyes *v.* Brown, 33 Vermont, 431; Hutchins *v.* Watts, 35 Ibid. 360; Ponton *v.* Griffin, 72 North Carolina, 362; Putney *v.* Farnham, 27 Wisconsin, 187; Balliet *v.* Scott, 32 Ibid. 174; Neumann *v.* Calumet & H. M. Co., 57 Michigan, 97.

[2] Lovely *v.* Caldwell, 4 Alabama, 684.

[3] Marlin *v.* Kirksey, 23 Georgia, 164.

ual against an attachment, under which the drawer of the check was summoned as garnishee of A.[1]

§ 615 *a*. All the views expressed in this chapter will have been seen to refer to cases of the assignment of a debt *before* the garnishment of the debtor. No assignment made after that event can have any effect to deprive the attachment plaintiff of his recourse against the garnishee.[2]

[1] Fulweiler *v.* Hughes, 17 Penn. State, 440.

[2] Stevens *v.* Pugh, 12 Iowa, 430.

CHAPTER XXXII.

THE GARNISHEE'S LIABILITY, AS AFFECTED BY THE COMMENCEMENT, PENDENCY, AND COMPLETION OF LEGAL PROCEEDINGS AGAINST HIM, BY THE DEFENDANT, FOR THE RECOVERY OF THE DEBT.

§ 616. It frequently happens that when a garnishee is summoned, a suit is pending against him on the part of the defendant, or that the defendant has obtained a judgment against him for the debt in respect of which he is garnished. Numerous cases of this description have received adjudication, and the decisions are by no means consentaneous. We will consider, I. The effect of the pendency of a suit by the defendant against the garnishee; and, II. The question whether a judgment debtor can be held as garnishee of the judgment plaintiff.

§ 617. I. *The Effect of the Pendency of a Suit by the Defendant against the Garnishee.* It is an invariable and indispensable principle, that a garnishee shall not be made to pay his debt twice. Consequently, when he is in such a situation that, if charged as garnishee, he cannot defend himself against a second payment to his creditor, he should not be charged. This principle has been applied, as we shall presently see, to cases where legal proceedings were pending against the garnishee on behalf of the defendant.

§ 618. A case is reported as having been decided in Massachusetts, in 1780, taking the broad ground that a garnishee cannot be charged on account of a debt, for the recovery of which an action, previously commenced by the defendant, is pending at the time of the garnishment. This was under the old provincial trustee act of 32 Geo. II.;[1] but it was overruled in 1828, under the then existing statute.[2] In New Hampshire, likewise, the same ground was at one time assumed,[3] but afterwards abandoned.[4]

[1] Gridley *v.* Harraden, 14 Mass. 496.
[2] Thorndike *v.* DeWolf, 6 Pick. 120.
[3] Burnham *v.* Folsom, 5 New Hamp. 566.
[4] Foster *v.* Dudley, 10 Foster, 463. See Smith *v.* Durbridge, 26 Louisiana Annual, 531.

§ 619. There came before the Supreme Court of the United States a case, which might seem to favor the view first entertained in Massachusetts and New Hampshire, but it is essentially different. A. sued B. in the District Court of the United States for Alabama. After the action was brought, B. was summoned as garnishee of A., in a county court of Alabama, and judgment was there rendered against him. He then pleaded the judgment in bar of the action pending in the United States Court, and the court, on demurrer, held the plea bad. The Supreme Court on this point say: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, that would extremely embarrass the administration of justice." The court, however, expressly recognize the doctrine that if the garnishment had taken place before the action was brought, it would have been sufficient in abatement, or bar, as the case might be. They say: "If the attachment had been conducted to a conclusion, and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question. And if the defendant would have been protected *pro tanto*, under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle would support a plea in abatement of an attachment pending prior to the commencement of the present suit. The attachment of the debt in such case, in the hands of the defendant, would fix it there in favor of the attaching creditor, and the defendant could not afterwards pay it over to the plaintiff. The attaching creditor would, in such case, acquire a lien upon the debt, binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, could not fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal; and where the suit in one court is commenced prior to the proceedings under attachment in another court, such proceedings cannot arrest the suit; and the maxim *qui prior est tempore, potior est jure*, must govern the case."[1]

[1] Wallace *v.* McConnell, 13 Peters, 651; Greenwood *v.* Rector, Hempstead, 136. See Bingham *v.* Smith, 5 Alabama, 708; Wood *v.* Lake, 13 Wisconsin, 84;

The difference between this case and those first decided in New Hampshire and Massachusetts, lies in the two proceedings in Alabama taking place in different jurisdictions; and the whole decision of the Supreme Court of the United States was based on the conflict of jurisdiction which would grow out of a practice such as that passed upon by that tribunal.

In Massachusetts, it is now held, that the liability of a defendant in a suit pending in that State, is not discharged by his payment of a judgment rendered against him in another State, as garnishee of the plaintiff, in a proceeding commenced after the institution of the suit in Massachusetts, where the garnishee does not make known the existence of that suit;[1] and that a garnishee will not be charged in Massachusetts for a debt upon which a suit was instituted against him in another State, before the commencement of the garnishment proceeding, and to which he has appeared.[2]

§ 620. In Massachusetts, the liability of a garnishee where an action on behalf of the defendant is pending against him, turns upon the state of the pleadings in the action at the time of the garnishment. If the pleadings are in such state that the garnishee can plead the garnishment in bar of the action, he can be charged; otherwise not.[3] Hence, in the first reported case of the kind in that State, where the garnishee had been sued by the defendant, and, before the garnishment, the action had been referred by rule of court, in which rule it was agreed that judgment should be entered up according to the report of the referees, and execution issued thereon; it was determined that the garnishee could not be charged, because in this state of the action no day for pleading remained for the garnishee, and the law furnished him no defence against the defendant's demand of judgment.[4] The same rule was enforced in a case of similar facts, where the garnishment took place after the award of the referees, but before judgment rendered thereon.[5]

In another case, where, after issue joined, the defendant was summoned as garnishee of the plaintiff, and after verdict for the plaintiff the defendant moved in arrest of judgment, on the ground of the garnishment, the same court held, that the motion

Arthur *v.* Batte, 42 Texas, 159; Burke *v.* Hance, 76 Ibid. 76; Noyes *v.* Foster, 48 Michigan, 273; Custer *v.* White, 49 Ibid. 262; Grosslight *v.* Crisup, 58 Ibid. 531.

[1] Whipple *v.* Robbins, 97 Mass. 107.

[2] American Bank *v.* Rollins, 99 Mass. 313.

[3] Thorndike *v.* De Wolf, 6 Pick. 120.

[4] Howell *v.* Freeman, 3 Mass. 121.

[5] McCaffrey *v.* Moore, 18 Pick. 492.

could not prevail, and that the garnishment was void, because made after issue joined, when the garnishee could not defend himself against a recovery in the action, by the trial of any issue in fact or in law, on any plea which he had opportunity to plead.[1]

Where, however, the defendant in a pending action was garnished, and, before the action was brought to a judgment, he was charged as garnishee, and paid the amount recovered against him as such, it was held to be a good bar to the action.[2]

And where the garnishee is, at the time of the garnishment, indebted to the defendant, a payment by him of a judgment subsequently recovered will not discharge him. Thus, where A. was summoned as garnishee of B., pending a suit against him by B., and it was agreed between A. and the plaintiff in attachment, that the garnishment proceedings should be continued until the suit of B. against A. should be determined; and B. afterward obtained judgment against A., who appealed therefrom, and gave bond to abide the decision of the appellate court; and A. then answered as garnishee, denying that he was liable on the contract on which B. had obtained a judgment, and referring to his appeal from the judgment; and at a subsequent time further answered, that he had settled the appeal, by paying the amount of the judgment appealed from; it was held, that A. was liable as garnishee of B. The court fully recognized the principles they had previously laid down, in regard to summoning a person as garnishee pending an action against him; but held, that the garnishee, by his mistake of the nature of his defence against B.'s demand, or by his inattention, had placed himself beyond the protection of those principles.[3]

In Maine, the mere fact of issue being joined is considered to have no effect in exempting the garnishee from liability.[4]

In Vermont and New Hampshire, on the other hand, the courts seem disposed to adopt the Massachusetts rule, so far as to discharge the garnishee, where the condition of the action against him is such that he cannot plead the garnishment in bar thereof.[5] Hence, where the garnishee disclosed that the defendant had commenced a suit in chancery against him, which, before the garnishment, had been set down for trial, and between the time of the garnishment and that of filing the gar-

[1] Kidd *v.* Shepherd, 4 Mass. 238.
[2] Foster *v.* Jones, 15 Mass. 185.
[3] Locke *v.* Tippets, 7 Mass. 149.
[4] Smith *v.* Barker, 10 Maine, 458.
[5] Trombly *v.* Clark, 13 Vermont, 118; Foster *v.* Dudley, 10 Foster, 463; Thayer *v.* Pratt, 47 New Hamp. 470.

nishee's answer, had been heard by the chancellor, and continued for his decision; the court decided that the garnishee could not be charged, because the proceedings in the chancery court could not be arrested, or its decree anticipated, and the garnishee, if charged, might be compelled to pay the demand a second time.[1]

In Pennsylvania, the pendency of an action by the defendant against the garnishee, at the time of the garnishment, will not prevent the garnishee's liability. The court there, acting upon probably the first case in this country in which this question was involved, reject the English doctrine that a debt in suit cannot be attached, as inapplicable to the state of things here. The doctrine in England grows out of the fact that garnishment there is the offspring of special and local custom, and takes place in inferior courts; and the courts of general jurisdiction will not permit suits depending before them to be affected by the process of inferior tribunals exercising a jurisdiction of the kind belonging to the courts of the sheriff and lord mayor of London.[2] In Tennessee, the same view is taken as in Pennsylvania;[3] and so in Alabama, Arkansas, and Kansas, where the suit and the garnishment are in the same court;[4] but not where they are in different courts; at least when the debt is controverted.[5] In Missouri, it is held, that the pendency of a suit against the garnishee by the attachment defendant, whether in the same jurisdiction or another, does not relieve the garnishee from liability as such.[6]

§ 621. We may state, then, as the result of these decisions, 1. That the pendency, in the same court, of an action on behalf of the defendant against the garnishee, will not preclude the garnishee's being charged; 2. That where the action is pending in one court and the garnishment in another, and the courts are of

[1] Wadsworth *v.* Clark, 14 Vermont, 139. In Spicer *v.* Spicer, 23 Vermont, 678, it was held that when a defendant, in a suit pending, is summoned as garnishee of the plaintiff, and is charged for the full amount of the plaintiff's claim against him, and the judgment charging him remains unsatisfied; judgment should be rendered for the plaintiff for the amount of his claim; but that the court will order execution stayed, until the plaintiff shall cause the defendant to be released from the garnishment.

[2] McCarty *v.* Emlen, 2 Dallas, 277; 2 Yeates, 190; Crabb *v.* Jones, 2 Miles, 130; Sweeny *v.* Allen, 1 Penn. State, 380.

[3] Huff *v.* Mills, 7 Yerger, 42; Penniman *v.* Smith, 5 Lea, 130. See Thrasher *v.* Buckingham, 40 Mississippi, 67.

[4] Hitt *v.* Lacy, 3 Alabama, 104; McDonald *v.* Carney, 8 Kansas, 20; St. Louis, I. M. & S. Ry. Co. *v.* Richter, 46 Arkansas, 349.

[5] Bingham *v.* Smith, 5 Alabama, 651.

[6] Lieber *v.* St. Louis A. & M. Assoc'n, 36 Missouri, 382; Minor *v.* Rogers Coal Co., 25 Missouri Appeal, 78.

different jurisdictions, that which was first instituted will be sustained; and, 3. That when the action is in such a situation that the garnishee, if charged, cannot avail himself of the judgment in attachment as a bar to a recovery in the action, he cannot be held as garnishee.

§ 622. II. *Can a Judgment Debtor be held as Garnishee of the Judgment Creditor?* On this point the decisions differ. Where, as in New Hampshire, a person against whom suit has been brought cannot be charged as garnishee; and where, as in Massachusetts and Vermont, the garnishee in such case cannot be made liable, if the pending action be in such situation that the garnishment cannot be pleaded therein; and where the judgment is in one court and the garnishment in another; it might be expected to be decided that the judgment debtor could not be charged as garnishee of the judgment creditor.

In New Hampshire and Vermont, the question has not directly come up, though in the latter State the court, on one occasion, used language which might be construed to authorize the garnishment of a judgment debtor. They say: "The statute makes all the goods, chattels, rights, or credits of the defendant in the hands of the trustee liable for the debts of the defendant. Hence, if the trustee is indebted to the defendant, he is liable to be summoned as trustee without regard to the nature of the indebtedness, whether by record, specialty, or simple contract. No exception is made whether a suit is depending in favor of the defendant, or whether payable or not." [1]

In Massachusetts, it was held, that one against whom an execution on a judgment was in the hands of a sheriff, could not be charged as garnishee of the plaintiff therein; [2] and that a judgment debtor, against whom an execution might issue, could not be so charged. [3] Justice STORY, in a case which came before the Circuit Court of the United States in Rhode Island, held the same ground, [4] as did the Supreme Courts of New Jersey, [5] Arkansas, [6] and Oregon. [7]

§ 623. On the other side we find the courts of Connecticut, Pennsylvania, Delaware, Alabama, Mississippi, Indiana, Illinois,

[1] Trombly *v.* Clark, 13 Vermont, 118.
[2] Sharp *v.* Clark, 2 Mass. 91.
[3] Prescott *v.* Parker, 4 Mass. 170.
[4] Franklin *v.* Ward, 3 Mason, 136.
[5] Shinn *v.* Zimmerman, 3 Zabriskie, 150; Black *v.* Black, 32 New Jersey Equity, 74.
[6] Trowbridge *v.* Means, 5 Arkansas, 135; Tunstall *v.* Means, Ibid. 700.
[7] Norton *v.* Winter, 1 Oregon, 47; Despain *v.* Crow, 14 Ibid. 404.

and Kansas. In the first-named State, the court thus announced its views: "By the custom of London, from which our foreign attachment system was principally derived, it is said, that a judgment debt cannot be attached; and the same has been holden by the courts in Massachusetts. A fair, and, as we think, very obvious construction of our statute on this subject, as well as the general policy of our attachment laws, leads us to a different conclusion. It is enacted that 'where debts are due from *any person* to an absent and absconding debtor, it shall be lawful for any creditor to bring his action against such absent and absconding debtor;' and that '*any debt* due from such debtor to the defendant shall be secured to pay such judgment as the plaintiff shall recover.' The provisions of this statute were extended, in 1830, to the attachment of debts due to such persons as should be discharged from imprisonment. The language of this statute clearly embraces judgment debts as well as others, and the reason and equity of it are equally extensive. A judgment debt is liquidated and certain, and, in ordinary cases, little opportunity or necessity remains for controversy respecting its existence, character, or amount. The policy of our laws has ever required that all the property of a debtor, not exempted by law from execution, should be subject to the demands of his creditors, and that every facility, consistent with the reasonable immunities of debtors, should be afforded to subject such property to legal process.

"It is true, as has been contended, that to subject judgment debts to attachment, and especially those upon which executions have issued, may, in some cases, produce inconvenience and embarrassment to debtors, as well as to creditors. Such consequences have resulted from the operation of our foreign attachment system, in ordinary cases; and this was foreseen and has been known to our legislators, by whom this system has been introduced, continued, and extended; but the general interest of the community in this respect has been considered as paramount to the possible and occasional inconveniences to which individuals may be sometimes subjected. A judgment debtor, in such cases, is not without relief; he may resort, whenever serious danger or loss is apprehended, either to his writ of *audita querela*, or to the powers of a court of chancery for appropriate relief." [1]

§ 624. The same views, substantially, influenced the courts of

[1] Gager *v.* Watson, 11 Conn. 168.

Pennsylvania,[1] Delaware,[2] Alabama,[3] Mississippi,[4] Indiana,[5] Illinois,[6] and Kansas,[7] to the same conclusion; and while there is much force in the contrary reasons, it is difficult to lay aside the demands of public policy in favor of subjecting *all* of a debtor's effects, — save such as are by law expressly exempted, — to the payment of his debts. A striking illustration of the disadvantage of exempting judgment debts from attachment, would be in a case, by no means improbable, of a debtor having no visible property, and no debts due him but judgment debts, but enough of such debts to pay his own liabilities. Upon what principle of right or justice, under such circumstances, ought his creditors to be denied access by this process to the debts thus due him? Is the temporary inconvenience to which his debtors might be exposed sufficient to outweigh all the considerations in favor of subjecting them to the payment of debts, without the payment of which a fraud may be perpetrated in defiance of law?

§ 625. However strongly these reasons apply to the case of a garnishment of the judgment debtor in the same court in which the judgment was rendered, their force is lost when the judgment is in one court and the garnishment in another. There a new question springs up, growing out of the conflict of jurisdiction which at once takes place. Upon what ground can one court assume to nullify in this indirect manner the judgments of another? Clearly, the attempt would be absurd, especially where the two courts were of different jurisdictions, or existed under different governments. Take, for example, the case of a court of law attempting to arrest the execution of a decree of a court of equity for the payment of money, by garnishing the defendant; or that of a State court so interfering with the judgment of a Federal court, or *vice versa;* it is not to be supposed that, in either case, the court rendering the judgment or decree would or should tolerate so violent an encroachment on its prerogatives and jurisdiction. This question arose in South Caro-

[1] Crabb *v.* Jones, 2 Miles, 130; Sweeny *v.* Allen, 1 Penn. State, 380; Fithian *v.* New York & Erie R. R. Co., 31 Ibid. 114. In Scheffer *v.* Boy, 5 Penn. County C't, 159, a divorced husband was charged as garnishee of the divorced wife, on account of alimony decreed to her, — the amount and times of payment of which were fixed by the decree.

[2] Belcher *v.* Grubb, 4 Harrington, 461; Webster *v.* McDaniel, 2 Delaware Ch'y, 297.

[3] Skipper *v.* Foster, 29 Alabama, 330; Calhoun *v.* Whittle, 56 Ibid. 138.

[4] Gray *v.* Henby, 1 Smedes & Marshall, 598; O'Brien *v.* Liddell, 10 Ibid. 371.

[5] Halbert *v.* Stinson, 6 Blackford, 398.

[6] Minard *v.* Lawler, 26 Illinois, 301.

[7] Keith *v.* Harris, 9 Kansas, 386.

lina, and it was there held, that where the fund sought to be reached is in another court, it cannot be attached;[1] and hence that a judgment in a Federal court is not the subject of attachment in a State court.[2] And in Rhode Island and New Jersey it was held, that a party could not be charged there as garnishee, against whom a judgment had been obtained in another State;[3] and in Tennessee, that a judgment debtor in a court of record could not be subjected to garnishment in a suit before a justice of the peace;[4] and in Michigan, that a defendant in a judgment rendered by a justice of the peace could not be garnished in a suit before another justice of the peace.[5]

§ 626. Service of an attachment on the attorney who obtained a judgment, or on the clerk of the court in which the judgment was rendered, will not reach the judgment;[6] much less would a seizure of the judgment record have that effect.[7]

§ 627. Where it is sought to charge a judgment debtor as garnishee, and the fact of indebtedness is in issue, the judgment in favor of the attachment defendant against the garnishee makes out a *prima facie* case against the latter: if he has discharged it, he must show it.[8]

§ 627 *a*. A verdict for damages against a defendant cannot authorize his garnishment as a debtor of the plaintiff. Until a judgment is entered on the verdict there is no indebtedness.[9] But an award of money by arbitrators, though a *quasi* verdict, becomes, when published, a debt to him in whose favor it was rendered, authorizing the garnishment of the debtor.[10]

[1] Young *v.* Young, 2 Hill (S. C.), 426.

[2] Burrell *v.* Letson, 2 Speers, 378. See Thomas *v.* Wooldridge, 2 Woods, 667; Perkins *v.* Guy, 2 Montana, 16; Henry *v.* G. P. M. Co., 15 Federal Reporter, 649; Henry *v.* Gold Park M. Co., 5 McCrary, 70.

[3] American Bank *v.* Snow, 9 Rhode Island, 11; Shinn *v.* Zimmerman, 3 Zabriskie, 150. See Jones *v.* N. Y. & E. R. R. Co., 1 Grant, 457.

[4] Clodfelter *v.* Cox, 1 Sneed, 330. *Sed contra*, Luton *v.* Hoehn, 72 Illinois, 81.

[5] Sievers *v.* Woodburn S. W. Co., 43 Michigan, 275.

[6] *In re* Flandrow, 27 New York Supreme Ct. 36; affirmed in 84 New York, 1; Daley *v.* Cunningham, 3 Louisiana Annual, 55.

[7] Hanna *v.* Bry, 5 Louisiana Annual, 651.

[8] O'Brien *v.* Liddell, 10 Smedes & Marshall, 371.

[9] Detroit P. & T. Co. *v.* Reilly, 46 Michigan, 459; Thayer *v.* Southwick, 8 Gray, 229.

[10] Dickinson *v.* Dickinson, 59 Vermont, 678.

CHAPTER XXXIII.

ANSWER OF THE GARNISHEE.

§ 628. In most of the States, the manner in which a garnishee responds to the proceedings against him, is by a sworn answer to interrogatories propounded to him. This answer must be made by the garnishee in person; the power to make it under oath cannot be conferred on another.[1] By the custom of London the garnishee might plead that he had no moneys of the defendant in his hands at the time of the garnishment, or at any time since, and put the plaintiff to prove any money in his hands; or he might discharge the attachment by waging of law, that is, coming into court and swearing, that at the time of the attachment made, or at any time since, he had not, owed not, nor did detain, nor yet has, or owes, or does detain from the defendant any money.[2] Pleading to the garnishment is still practised in some States, but in far the larger number the better mode of responding by answer is established. The present chapter will, therefore, be devoted to the consideration of the Answer of the Garnishee. This subject will be treated under the following heads: —

I. What the garnishee may be required to state, and may, *ex mero motu*, state in his answer.

II. What he may not be required to state in his answer.

III. Of amending the answer.

IV. The effect of the answer.

V. The construction to be given to the answer.

§ 629. I. *What the Garnishee may be required to state and may*, ex mero motu, *state in his Answer.* It is the duty of a garnishee to state, with entire accuracy and distinctness, all facts that may be necessary to enable the court to decide intelligently the question of his liability. It is no less his interest to do so; for, should the defendant subsequently institute an action against him for the recovery of the debt or property in respect of

[1] Dickson *v.* Morgan, 7 Louisiana Annual, 490.

[2] Priv. Lond. 258.

which the garnishee was made liable as such, it would be of the first importance that the record in the attachment suit should show conclusively the ground upon which the garnishee was charged. And for the want of such accuracy and distinctness, a garnishee may be charged when he ought not to be, or may escape liability when in justice he should be charged.

§ 629 *a*. No statements or representations made to the plaintiff by the garnishee, before his garnishment, as to his indebtedness to the defendant, whereby the plaintiff was led to institute the garnishment proceedings, can have the effect of estopping the garnishee from denying such indebtedness in his answer. In Indiana a case of this description occurred, where the garnishee answered, denying all indebtedness, at any time, to the defendant. To this answer the plaintiff replied, in estoppel, that before the institution of the garnishment proceedings, the garnishee admitted and represented to the plaintiff that he had made a certain purchase of property of a third person, which really belonged to the defendant; that a portion of the purchase-money remained unpaid; and that if the plaintiff would summon him as garnishee, he would pay that unpaid portion to the plaintiff; whereby the plaintiff was induced to institute the garnishment proceedings. To this reply the garnishee demurred; and in the Supreme Court it was held, that the facts therein set forth did not estop the garnishee from denying indebtedness to the defendant.[1]

§ 630. It is incumbent upon a garnishee, for his own protection, to state in his answer every fact within his knowledge, which had destroyed or would affect the relation of debtor and creditor between him and the defendant, or which would show that he ought not to be charged. For, a stranger to the garnishment proceeding is not, by the judgment against the garnishee, precluded from proving that there were facts within the knowledge of the garnishee which he did not disclose, and which, if disclosed, would have discharged him, or that there was collusion between him and the plaintiff or defendant in the attachment suit.[2] *A fortiori* is this so if he *deny* a fact which, if disclosed, would have discharged him.[3]

[1] Lewis *v.* Prenatt, 24 Indiana, 98. See Starry *v.* Korab, 65 Iowa, 267; Henderson *v.* McMahill, 75 Ibid. 217; Miller *v.* Anderson, 19 Missouri Appeal, 71; Almy *v.* Thurber, 99 New York, 407.

[2] Andrews *v.* Herring, 5 Mass. 210; Lamkin *v.* Phillips, 9 Porter, 98.

[3] Wilkinson *v.* Hall, 6 Gray, 568.

The class of cases to which this rule has been most frequently applied is that where the garnishee, knowing that his indebtedness to the defendant had, before the garnishment, been assigned to a third party, yet confesses an indebtedness to the defendant, and is charged in respect thereof, and afterwards, when sued by the assignee, finds that the judgment against him as garnishee is no protection. Numerous cases of this description are reported, to which more special reference is subsequently made.[1]

But the rule extends to other matters which were known to the garnishee, and were not disclosed by him. Thus, where A. was garnished in a suit against B., and failed in his answer to disclose the fact, — which was known to him, — that, before the garnishment, B. had applied to the District Court of the United States to be declared a bankrupt, and soon after was so declared; and judgment was accordingly rendered against A. for the debt he confessed to be owing to B.; and afterwards he was sued by the assignee in bankruptcy upon the debt, and set up as a defence the judgment rendered against him as garnishee: it was held, that, having in his answer concealed, or omitted to give notice of, a fact which he was bound to disclose, and which would have prevented a judgment against him, the defence was unavailable.[2] So, where, by law, wages due to a person are exempt from attachment, and A. gave to B. a due-bill for an amount due him for wages, and, upon being summoned as garnishee of B., answered, admitting the giving of the due-bill, but said nothing as to the consideration for which it was given, and was charged as garnishee; it was held, in an action against him by B. on the due-bill, that the judgment against him was no defence.[3] So, where a garnishee pleaded *nulla bona* on the 20th of September, and the trial of the case, on that plea, began on the succeeding 29th of October, and on the 30th the defendant and the garnishee filed a special plea claiming that the money attached in the garnishee's hands was by law exempt from attachment; the court held, that though that would have been an available defence if it had been set up in time, it could not be brought in after the jury was sworn to try the issue tendered by the plea of *nulla bona*.[4] So, where A. was sued by B., in Massa-

[1] *Post*, § 717.

[2] Nugent *v.* Opdyke, 9 Robinson (La.), 453.

[3] *Ante*, § 480; *post*, § 714; Lock *v.* Johnson, 36 Maine, 464; Pierce *v.* Chicago & N. R. Co., 36 Wisconsin, 283; Chicago & A. R. R. Co. *v.* Ragland, 84 Illinois, 375; Chicago, R. I. & P. R. R. Co. *v.* Mason, 11 Bradwell, 525; Welker *v.* Hinze, 16 Ibid. 326; Wright *v.* C. B. & Q. R. R. Co., 19 Nebraska, 175; Terre Haute & I. R. Co. *v.* Baker, 122 Ind. 433.

[4] Bancord *v.* Parker, 65 Penn. State, 336.

chusetts, on a demand, and afterwards, in Connecticut, he was summoned as garnishee of B., and failed to make known the fact of the previous suit in Massachusetts, and was charged; it was held, in the latter State, that the payment by him of the Connecticut judgment was no defence against a recovery by B.[1] So, where the maker of a note to B. knew that the note when given belonged in fact to C., and when he was summoned as garnishee of B., he failed to make known that fact; the judgment against him as garnishee was held to be no defence against an action by C. on the note.[2] So, where a stakeholder of a bet was summoned as garnishee of A., and suffered judgment to go against him as such, on account of money deposited with him by A., though he had been notified by A. that the bet was, in fact, made with the money and for the use of B., and failed to make that fact known; it was held, in an action against him by B. for the money, that the judgment in the garnishment proceeding was no defence.[3]

§ 630 *a*. It often happens that the same individual is garnished in several suits against the same defendant; and in reference to such a state of fact the importance of care in the framing of the garnishee's answer in each case after the first is strikingly enforced. If the garnishments occurred at different times, the garnishee has no occasion, in answering the first, to refer to the subsequent ones; but in every subsequent case he should set forth, and bring clearly to the notice of the court, *all previous* garnishments, so as to secure himself against any more judgments than the debt owing by him, or the effects in his hands, will justify. And where two or more garnishments are simultaneously made, the fact of their having been so made should be stated by the garnishee, so as to enable the court to settle the several rights of the attachers, as well as protect him. If the garnishee fail in thus presenting the facts, and, in consequence thereof, more judgments are rendered against him than the debt owing or the effects held by him authorized, he is wholly remediless; he brings upon himself a double liability by his own negligence, and the law will not protect a negligent garnishee, any more than it will justify carelessness in any other party; especially where such negligence may result to the injury of a *bona fide* creditor.[4] In every case of this description the second

[1] Whipple *v.* Robbins, 97 Mass. 107.
[2] Pitts *v.* Mower, 18 Maine, 361.
[3] Hardy *v.* Hunt, 11 California, 343. See Kimball *v.* Macomber, 50 Michigan, 362.
[4] Houston *v.* Wolcott, 7 Iowa, 173.

garnishment must remain unacted on until the first has been disposed of. The garnishee cannot be discharged in the second case, because of his having been summoned in the first; for the plaintiff in the first may recover no judgment, or one for less than he claimed, and so leave effects in the garnishee's hands sufficient to meet the second. The proper course is to continue the second case until the first is finally determined.[1]

§ 631. But though the garnishee is under obligation, for his own protection and that of third parties, to state all facts within his knowledge which have destroyed the relation of debtor and creditor between him and the defendant, he cannot be allowed in his answer to make allegations, which have the effect of changing the terms of a written contract, under which he appears to be a debtor of the defendant. Therefore, where, by a written contract, the garnishee was bound to pay the defendant a certain sum of money, it was held, that he could not allege in his answer that that sum was to be paid in a certain description of bank paper.[2]

§ 632. If the garnishee was not indebted to, or did not hold property of, the defendant, he should simply and explicitly so declare. If he be in doubt whether under an existing state of facts he is chargeable, he should state all the essential facts with minuteness and precision, and leave it for the court to decide the question of his liability. And it will be advisable for him to take the same course, whenever his liability grows out of transactions in which are involved a multiplicity of facts. If he is indebted to the defendant on account of a single transaction, of simple contract, — which is the most usual case, — he should, in like manner, state the facts out of which his indebtedness arose.

§ 633. In all cases he should carefully avoid any evasion or equivocation, for an evasive answer will be treated as a nullity;[3] or if not so, it will be construed most strongly against him;[4] and any equivocation would subject the whole answer to suspicion. He should, with equal care, avoid admitting himself, in

[1] Cutter *v.* Perkins, 47 Maine, 557; Prentiss *v.* Danaher, 20 Wisconsin, 311; Danaher *v.* Prentiss, 22 Ibid. 311; Brickey *v.* Davis, 9 Bradwell, 362.

[2] Field *v.* Watkins, 5 Arkansas, 672.

[3] Scales *v.* Swan, 9 Porter, 163; Parker *v.* Page, 38 California, 522.

[4] Crain *v.* Gould, 46 Illinois, 293; Keel *v.* Ogden, 5 Monroe, 362; Dawson *v.* Maria, 15 Oregon, 556.

his answer, liable as garnishee when in fact he is not, for when he has once made such an admission, it is said he is estopped from afterward denying it.[1] Thus, where in a suit against *Daniel* H., a garnishee answered, admitting having executed certain notes to him, and judgment was rendered against him in respect thereof; and he moved to set aside the judgment on the ground that he made a mistake in his answer, in admitting having given notes to *Daniel* H. when in fact he had given them to *Samuel* H.; his motion was denied, — the court saying: "A garnishee stands upon the same footing, and must pay the same penalty for his negligence, inadvertence, or forgetfulness as any other defendant whatsoever."[2]

§ 633 *a*. If the law authorize a denial by the plaintiff of the answer, that is not the proper course for him to take if the garnishee refuse to answer, or answer evasively; for it would produce no issue to be tried between them: he should except to the sufficiency of the answer, and if the court sustain the exception, and order the garnishee to answer more fully, and he refuse to do so, he is as much in default as if he had not answered at all, and judgment may be rendered against him accordingly.[3]

§ 634. The important points to be attained in framing a garnishee's answer, are fulness and explicitness. The absence from an answer of either of these qualities might in many cases subject the garnishee to a judgment against him. He should answer every pertinent interrogatory, so far as he is able, if not in his power to do so fully; otherwise, it is said in Massachusetts, he will be charged, even though he should declare his belief that he has in his hands nothing of the defendant's.[4] And there should be nothing doubtful in his expressions.; for, on the ground that he might have used expressions free from doubt, those of a doubtful kind will be construed against him.[5] The full extent and application of this last rule will be considered under the fifth head of this chapter.

§ 635. When the answer of a garnishee shall have come up to the foregoing rules, and is full and intelligible in reply to the

[1] Woodbridge *v.* Winthrop, 1 Root, 557. See Knisely *v.* Evans, 34 Ohio State, 158.

[2] Fretwell *v.* Laffoon, 77 Missouri, 26.

[3] Richardson *v.* White, 19 Arkansas, 241.

[4] Shaw *v.* Bunker, 2 Metcalf, 376.

[5] Sebor *v.* Armstrong, 4 Mass. 206; Cleveland *v.* Clap, 5 Ibid. 201; Kelly *v.* Bowman, 12 Pick. 383; Sampson *v.* Hyde, 16 New Hamp. 492; Brainard *v.* Shannon, 60 Maine, 342.

interrogatories exhibited against him, the court will protect him from further interrogatories, in relation to the matters embraced in his answer. Thus, where the garnishee stated in his answer that a certain sum was in his hands which had been earned by the defendant, and for which the defendant had drawn an order on him payable to a third person; and the plaintiff presented an additional interrogatory, requiring the garnishee to "*state distinctly* how much money was in his hands, at the time of the service of the writ on him, which had been earned by the defendant;" the court held, that the garnishee could not be charged in consequence of a refusal to answer this interrogatory, because it merely demanded of him to state distinctly what he had fully stated before.[1] And where the garnishee fully answered as to all matters between him and the defendant at the time of and prior to the garnishment; but refused to answer interrogatories in regard to transactions between them after the garnishment, and which he declared had no connection with any business or liabilities between him and the defendant; the court held him not chargeable by reason of his refusal to answer those interrogatories.[2]

§ 636. Whether a garnishee may in any case be charged because he refuses to answer pertinent interrogatories, must depend upon positive law or established practice. In Vermont, it is held to be discretionary with the court to charge him or not, and that the exercise of that discretion will not be revised by a superior tribunal.[3] Ordinarily the course to be pursued under such circumstances is prescribed by statute. In some States, the garnishee may, by attachment of his body, be compelled to answer; or judgment by default may be taken against him, to be made final in the same manner as in the case of a defendant, — in which case the plaintiff must prove the garnishee's liability;[4] or the refusal to answer is declared to be an admission that he has effects of the defendant, or is indebted to him, to an amount sufficient to satisfy the plaintiff's demand; when judgment will go against him as if he had made the admission in terms. In this case, if there are several interrogatories, a refusal to answer one, of a material character, will not be excused because the answer to the others *implies* a response to it. The

[1] Carrique *v.* Sidebottom, 3 Metcalf, 297. See Ullmeyer *v.* Ehrmann, 24 Louisiana Annual, 32.

[2] Humphrey *v.* Warren, 45 Maine, 216. See Wood *v.* Wall, 24 Wisconsin, 647.

[3] Worthington *v.* Jones, 23 Vermont, 546; Knapp *v.* Levanway, 27 Ibid. 298.

[4] Brotherton *v.* Anderson, 6 Missouri, 388.

garnishee must answer all, in a plain and distinct manner, or he will be made liable.[1]

In all cases of this description, the suggestion of the Supreme Court of Wisconsin might well be observed, — that the court, before rendering judgment against a garnishee for failing to answer a particular question, should inform him that the question is a proper and pertinent one for him to answer, and give him thereafter an opportunity to answer it.[2]

§ 636 *a*. Though the garnishee deny that he owes the defendant, or holds his money or property, yet if he refuses to answer questions respecting his business relations with the defendant, so as to enable the court to ascertain his true position, he will be charged, if the law under which he was summoned authorizes a garnishee to be charged where he refuses to answer. He puts his conclusion of law as to his liability in the place of that of the court, and denies to the court the means of testing the correctness of that conclusion.[3]

§ 636 *b*. If the law require a garnishee to appear in person in court and answer such interrogatories as the plaintiff may propound to him, in addition to those authorized by statute; and he file an answer to the latter, and fail to appear; his answer may be stricken from the files, and judgment by default may be taken against him.[4]

§ 637. It is not necessary to the fulness and explicitness of a garnishee's answer, that it should be conformed to the technical rules of pleading. In this respect it partakes of the nature of an answer in chancery. Thus, where a garnishee answered that he owned a note of the defendant for an amount greater than his indebtedness to the defendant, and on the trial offered in evidence an instrument in all respects conformable to that described in the answer, save that it was a bond instead of a note; it was held, that the answer was substantially sustained, and that it was of no consequence that the garnishee had failed, in describing the instrument, to employ the proper legal terms.[5]

§ 638. While it will be required of a garnishee to answer fully and intelligibly all pertinent interrogatories put to him,

[1] De Blanc *v.* Webb, 5 Louisiana, 82; Vason *v.* Clarke, 4 Louisiana Annual, 581.

[2] Wood *v.* Wall, 24 Wisconsin, 647.

[3] Mansfield *v.* N. E. Express Co., 58 Maine, 35.

[4] Penn *v.* Pelan, 52 Iowa, 535.

[5] Ashby *v.* Watson, 9 Missouri, 235.

regard will still be had to the circumstances in which he is placed, and which may prevent as full and positive an answer as would be desirable. If the answer is deficient in these respects, but it appears that the garnishee has responded as fully and positively as he could, he will not be charged for failing to do more. Thus, where the administrator of a person, who, in his lifetime, had been garnished, answered "to the best of his knowledge," it was held, that, though the answer might not be sufficient, if it had come from one having certain knowledge of the business, yet as it could not be expected that the administrator should be possessed of the same degree of knowledge as the intestate, and the answer appeared to be the best that could be obtained, it was sufficient.[1] So, where a garnishee disclosed that the defendant had agreed to build a house for him, and he had agreed to pay the defendant certain sums at certain stages of the work; that he had generally paid before the instalments became due; but that he had no means of ascertaining whether, at the time he was summoned, the payments were in advance of the work or not; it was held, that he should not be charged; the answer appearing to be as definite as it could be made.[2]

§ 639. A garnishee, in framing his answer, need not confine himself to matters within his own knowledge, but may introduce into it any extrinsic facts which he supposes important to a correct determination of the question of his liability, or in reference to the interests of others. Whether such facts will affect the issue will, of course, be decided by the court. It is principally in regard to the rights of third persons, not parties to the proceedings, that the introduction of such facts is desirable. They would often be without protection, unless the garnishee were at liberty thus to bring their rights under the cognizance of the court. The extrinsic facts thus introduced may be of almost any description. They may consist of writings, or verbal communications, or affidavits proceeding from third persons, and having reference to the question of his liability as garnishee. Thus, a garnishee answered that he had executed a bond to the defendant, conditioned for the payment to him of $1000, in one year after the death of the defendant's mother, and that he should pay the annual interest on that sum to the mother during her life; that he was informed, at the time of executing the bond, and had reason to believe, that it was originally taken by

[1] Ormsby *v.* Anson, 21 Maine, 23. [2] Harris *v.* Aiken, 3 Pick. 1.

the defendant for the use of himself, his brother, two sisters, and a minor child of a deceased brother, the heirs-at-law of the defendant's mother; that the mother had died; that the defendant, after her death, drew an order on the garnishee for $520, stating that sum to be in full for his part of the bond; and that in the letter to the drawee, covering the order, the defendant said that the other part of the bond belonged to the other heirs of his mother; and the order and letter were annexed to and made part of the answer. It was objected that these documents could not be received as part of the answer; but the objection was overruled, on the ground that if it were not competent for the garnishee to disclose anything but what was within his own personal knowledge, the interests and rights of *cestuis que trust* would be in great jeopardy; for their property would go to pay the debts of the trustee, and he might be wholly unable to respond.[1] So, where a garnishee offered, as a part of his answer, certain affidavits of third persons, the court held them admissible; and laid down the broad proposition, that a garnishee might refer to letters, statements, assignments, or other instruments and documents, and, adopting them, make them part of his answer.[2]

In all such cases, however, it is considered, in Massachusetts, where the answer was formerly conclusive and could not be controverted, that the extrinsic facts thus brought into the answer have no force in themselves, but are to be regarded only so far as the garnishee may declare his belief in their truth. They are received on the authority of his oath. If he does not believe them to be true, he ought not to make them part of his answer. If he makes them a part of his answer, and at the same time states his disbelief of their truth, the answer would so far be nugatory. Hence it is not alone the facts themselves, but the garnishee's adoption of them, and his belief in their truth, that give them weight in the question of his liability.[3] Therefore, an affidavit made by a person interested in the suit will be received, when made a part of the garnishee's answer, because it is received on the garnishee's oath, and not as the testimony of a witness.[4] Since the adoption in the Revised Statutes of Massachusetts, of 1836, of a provision allowing the plaintiff to

[1] Willard *v.* Sturtevant, 7 Pick. 194. See Sexton *v.* Amos, 39 Michigan, 695.

[2] Kelly *v.* Bowman, 12 Pick. 383; Giddings *v.* Coleman, 12 New Hamp. 153; Bell *v.* Jones, 17 Ibid. 307.

[3] Hawes *v.* Langton, 8 Pick. 67; Kelly *v.* Bowman, 12 Ibid. 383.

[4] Kelly *v.* Bowman, 12 Pick. 383. But such affidavit will not be received or noticed when not made part of the garnishee's answer. Minchin *v.* Moore, 11 Mass. 90.

allege and prove any facts not stated or denied by the garnishee in his answer, that may be material in deciding the question of the garnishee's liability, it is held there, that where no such facts are alleged or proved, and the garnishee has answered fairly and made a full disclosure, the facts which he states to be true, from his information and belief, are to be considered as true, as well as those stated on his own knowledge.[1]

But where, on the examination of a garnishee, a letter was shown him from a third person not a party to the suit, for the purpose of establishing that the property in the garnishee's hands was not the defendant's, but another's, and the garnishee authenticated the signature to the letter, but said nothing of its contents; the court refused to receive the letter as a part of his answer, because, though its genuineness was established, its contents might be untrue, and could not be presumed to be true.[2]

§ 639 *a*. It is no valid objection to an interrogatory to a garnishee, that it requires him to make a statement of his accounts with the defendant. Sometimes that might be the only mode of ascertaining the true state of the accounts of the parties; and litigants cannot be deprived of their rights, because it may occasion the garnishee some inconvenience.[3]

§ 640. It has been attempted to screen garnishees from answering interrogatories, a response to which might show them to have been parties to fraudulent sales or dispositions of personal property. In Massachusetts, the courts have sustained such questions, and required disclosures, even though the effect might be to subject the garnishee to liability as such out of his own property;[4] but in Louisiana a garnishee cannot be compelled to answer questions intended to elicit answers showing that he held under simulated or fraudulent titles property which really belonged to the defendant.[5]

§ 641. The extent to which privileged communications to a garnishee are protected from the scrutiny of a plaintiff's interrogatories, has been the subject of decision in Louisiana. The Code of that State provides that "no attorney or counsellor-at-

[1] Fay *v.* Sears, 111 Mass. 154.

[2] Stackpole *v.* Newman, 4 Mass. 85.

[3] Roquest *v.* Steamer B. E. Clark, 13 Louisiana Annual, 210.

[4] *Ante*, § 458; Devoll *v.* Brownell, 5 Pick. 448; Neally *v.* Ambrose, 21 Ibid. 185; Lamb *v.* Stone, 11 Ibid. 527; Oberteuffer *v.* Harwood, 2 McCrary, 415; 6 Federal Reporter, 828.

[5] Kearney *v.* Nixon, 19 Louisiana Annual, 16; Battles *v.* Simmons, 21 Ibid. 416.

law shall give evidence of anything that has been confided to him by his client, without the consent of such client." This is, in effect, embodying in a statute the principle of the common law.

In that State, an attorney-at-law was summoned as garnishee of his client, and various interrogatories were propounded to him, intended to elicit the date of his retainer, who was his client, the sums of money he had received, the persons from whom received, the payments made, and the persons to whom, and the date of the correspondence. Other interrogatories called for letters from the defendant, and a copy of the defendant's letter to him acknowledging the receipt of certain notes, or the garnishee's letter in reply thereto. The garnishee refused to answer certain of the interrogatories, on the ground that he was called upon to disclose privileged communications received from his clients. In reference to this the court said: "It is evident that the attorney cannot be permitted to disclose anything that has been confided to him by *his client*. But to bring the matter within the privilege which exempts the communication from disclosure, it must appear who is the client, in order to know whose communications are to be excluded. Again, it must be something *confided* by the client to the attorney. Now, the object is simply to ascertain who is the client who intrusted the notes to the garnishee for collection; when that relationship commenced and ended; and what money has been received, and what paid over, and to whom paid. None of these matters appear to us to be privileged communications; and if an attorney-at-law were not permitted to disclose who was his client, and what sums of money he had received or disbursed on his account, it would give rise to great frauds. If the attorney may be interrogated as to who is his client, he may also be asked through whose agency, or in what manner, and at what time he was retained." This ruling of the court covered all the interrogatories except three; and those the court required him to answer, unless he should to each one answer on oath that he could not answer the same without disclosing matters confided to him by his client, or advice given by him to his client, concerning the business about which he was retained.[1]

In another case an attorney was garnished, and answered that he had received a sum of money on account of the defendant, whose attorney he was, but added that he had almost immedi-

[1] Shaughnessy v. Fogg, 15 Louisiana Annual, 330. See White v. Bird, 20 Ibid. 188.

ately paid it over according to his client's instructions. When questioned as to when and to whom he paid it, he refused to answer; contending that he could not answer without disclosing matters and instructions confided to him in professional confidence. But the court held, that the disclosure could not be objected to on that ground, as the time of payment was within his knowledge independently of any communication he might have received from his client; and enforced its opinion with some instructive remarks about "a barefaced resort to such shameful evasions, under the pretence of a scrupulous regard for professional obligations." [1]

§ 642. II. *What the Garnishee may not be required to state in his Answer.* Garnishment is a method of seizure and not a bill of discovery. No interrogatories are proper, except such as have for their object the disclosure of indebtedness to the defendant or the possession by the garnishee of property of the defendant.[2] Almost every variety of question bearing upon either of these points may be propounded, and answers required, and, where authorized by statute or by the course of practice, compelled by attachment of the garnishee's body. Still, there must be a limit to this power of inquisition; and the garnishee has a right to have the correctness of a proposed inquiry adjudicated by the court, and is not bound to submit to any and every conceivable investigation, without objection; or, if he objects, become liable to pay the entire debt in the main action, if his objection should prove unfounded.[3] And the limit of investigation is to be fixed in the discretion of the court in which the garnishee is examined; the action of which will not be revised by a superior tribunal.[4] Therefore, where a garnishee after answering was required to answer, and did answer, three sets of interrogatories in detail; and the plaintiff filed a fourth set, the garnishee prayed the opinion of the court whether he was bound to answer them, and the court decided that he was not.[5] And so, where a garnishee answered denying indebtedness or possession of property, and the plaintiff then filed further interrogatories, giving a list of notes, due bills, and accounts of various parties in favor of the defendant, and demanding whether the garnishee had in his possession or under his control any

[1] Comstock *v.* Paie, 18 Louisiana, 479.
[2] State Nat. B'k *v.* Boatner, 39 Louisiana Annual, 843.
[3] Sawyer *v.* Webb, 5 Iowa, 315.
[4] Worthington *v.* Jones, 23 Vermont, 546; Knapp *v.* Levanway, 27 Ibid. 298.
[5] Warner *v.* Perkins, 8 Cushing, 518. See *ante*, § 635.

of them, and then proceeded thus: "If you have had control or possession of any of said notes and have n't them now, where are they? What has become of them? What did you do with them, and when did you part with them? If so, please describe the obligations and give the residences of the debtors": it was held, that the garnishee was not bound to answer those questions.[1] So, where several persons had in their hands jointly, property for which they were jointly accountable to A., and which was not under the exclusive control of either of them; and one of them was summoned as garnishee of A.; it was held, that he could not be required to answer as to the liability of the others, nor as to his joint liability with them, unless it was also *several*.[2]

§ 643. All interrogatories must be confined to such matters as the law by which they are authorized contemplates as the ground of a garnishee's liability. Thus, where a statute authorized the plaintiff to exhibit interrogatories touching the estate and effects of the defendant in possession or charge of the garnishee, or debts due and owing from him to the defendant; and one who held the office of justice of the peace was garnished, and he was asked how many judgments were entered on his docket in favor of the attachment defendant, and when, against whom, and for what amount they were respectively entered; the question was held illegal, and not such as the garnishee was bound to answer.[3] So, where interrogatories were propounded to a garnishee relating to personal property mortgaged to him by the defendant, to indemnify him against liabilities he had assumed for the defendant; it was held, that, as a mortgagee of goods not in possession of them could not be charged as garnishee in respect of the mortgage, the questions were impertinent, and should not be answered.[4]

§ 644. Every court will, of course, protect the garnishee from impertinent and vexatious questions, especially after he has fully answered. Hence, in Massachusetts, where a garnishee had so answered, and the plaintiff put further interrogatories, requiring him to state whether he had not, in conversation with third

[1] State Nat. B'k *v.* Boatner, 39 Louisiana Annual, 843.

[2] Frizzell *v.* Willard, 37 Arkansas, 478.

[3] Corbyn *v.* Bollman, 4 Watts & Sergeant, 342. See Lyman *v.* Parker, 33 Maine, 31; Roquest *v.* Steamer B. E. Clark, 13 Louisiana Annual, 210; Rhine *v.* D. H. & W. R. Co., 10 Philadelphia, 336; Struber *v.* Klein, 17 Ibid. 12.

[4] Callender *v.* Furbish, 46 Maine, 226.

persons, said differently from the statements of his answer, the court declared that the plaintiff had no right to ask questions for the purpose of discrediting the garnishee's disclosures; that the plaintiff was bound to take the garnishee's statements under oath as truth, and could neither impeach his character nor contradict his testimony; that therefore he was not entitled to the privilege of cross-examination; and that what the garnishee might have told other persons, or said on former occasions, is immaterial, and not a proper subject of inquiry.[1]

§ 645. A garnishee is not to be required to state in his answer anything that will deprive him of a defence against his debt to the defendant, which, if he were sued by the defendant, he might set up in bar of the action. Thus, where a garnishee answered, that, more than twenty years before he was summoned, he had given a bond to the defendant, payable on demand, the point was made whether he could be asked if he had paid the bond; and the court would not suffer the question to be put, because that would be to make him give up a defence he would have if sued by the defendant; when he might plead payment and rely on the lapse of time to support the plea.[2]

646. A garnishee cannot be required to state anything in his answer which will show him to have been guilty of a violation of law. Thus, where a garnishee was asked whether he had not received usurious interest of the defendant, it was held, that as he could not answer affirmatively without criminating himself, he should not be required to respond to the interrogatory.[3]

§ 647. In Massachusetts, and in Maine, a garnishee cannot be compelled to state anything which might tend to impair or impeach his title to real estate, derived from the defendant.[4] In New Hampshire, however, the contrary doctrine was held, in a case where the garnishee stated in his answer a conveyance of real estate to him by the defendant, and the court required an answer to supplementary interrogatories, intended to show the conveyance to have been made without consideration.[5]

[1] Crossman *v.* Crossman, 21 Pick. 21; Warner *v.* Perkins, 8 Cushing, 518; Nutter *v.* F. & L. R. Co., 131 Mass. 231; Emery *v.* Bidwell, 140 Ibid. 271.

[2] Gee *v.* Warwick, 2 Haywood (N. C.), 354.

[3] Boardman *v.* Roe, 13 Mass. 104.

[4] Boardman *v.* Roe, 13 Mass. 104; Russell *v.* Lewis, 15 Ibid. 127; Moor *v.* Towle, 38 Maine, 133.

[5] Bell *v.* Kendrick, 8 New Hamp. 520.

§ 648. Where, however, the garnishee disclosed a conveyance of real estate by the defendant to him, it was decided that the following question might be put to him: "Is there any real estate in your possession, belonging to the defendants, which you hold in trust for them, so that you are accountable for the rents and profits thereof? or are you under any obligation to account for the proceeds of the same or of any part thereof, if sold by you?"[1] And in a case where it was alleged that real estate conveyed by the defendant to the garnishee was held in trust, to be disposed of for the benefit of the latter, the court decided that the garnishee might be required to answer the following question: "At the time you received a deed or deeds of land from the defendant, or at any other time since, was there any agreement in writing or by parol, that you should dispose of the same and account to him in any manner for the proceeds?" — and that, in the event of the question being answered in the affirmative, there might be a further examination as to the disposition of the proceeds.[2]

§ 649. We have seen[3] that a garnishee may make the statements of others a part of his answer, and that, when so made, they will be received and considered. It is, however, entirely at his option to incorporate such statements in his answer, and the court will not compel him to do so against his will. Therefore, where the plaintiff delivered to the garnishee an affidavit of the defendant touching the effects in the garnishee's hands and tending to subject them to the attachment, and requested the garnishee to make the affidavit a part of his answer, which was refused; the court decided that it had no power to compel a compliance with the plaintiff's demand.[4]

§ 650. III. *Of Amending the Answer of a Garnishee.* The propriety of allowing a garnishee to amend his answer, or to put in a new answer, has been the subject of discussion, and has usually been sustained. There is, indeed, no sufficient reason why an amendment in such case should not be permitted. There may be cases where the garnishee discovers new facts, or finds that he has made an imperfect or erroneous statement; and there seems to be nothing in principle to prevent him, before final judgment, from making a more complete, perfect, and correct

[1] Russell *v.* Lewis, 15 Mass. 127.
[2] Hazen *v.* Emerson, 9 Pick. 144.
[3] *Ante*, § 639.
[4] Hawes *v.* Langton, 8 Pick. 67; Kelly *v.* Bowman, 12 Ibid. 383.

answer, being responsible as in all other cases for its truth. The only objection which could arise is, that a garnishee might be induced, by new suggestions and new views, to put in an answer varying from his first answer, and not true in itself. But when it is considered that, by any mode of administering the law, the garnishee may take his own time and his own counsel, and make such answer as he will, there seems to be no more danger of falsification in the one case than in the other.[1]

In Louisiana, while the discretionary authority of the court to permit amendments, where an answer is really responsive to the question, is admitted, it is yet considered that an answer which is manifestly evasive ought not to be amended, as such a practice might lead to frivolous delays.[2] And in that State it was held, that where a garnishee has answered acknowledging his indebtedness to the defendant, he cannot afterwards file another answer, the effect of which is to release him from liability.[3] And so in Tennessee.[4]

In Wisconsin, the garnishee is, under some circumstances, examined before a commissioner, when he may be subjected to unlimited interrogation. In a case there in which the examination covered more than three hundred folios, questions and answers, the plaintiff, not satisfied with the answer, — that is, the whole examination, took issue thereon. On the trial of that issue the garnishee was permitted to explain, contradict, and qualify admissions and statements made by him before the commissioner; and the appellate court sustained the action of the court below in this respect, and held that the garnishee had an undoubted right to correct, on the trial, any mistakes he had made in his examination before the commissioner.[5]

§ 651. IV. *The Effect to be given to the Garnishee's Answer.* This depends in a great measure on the statutory provisions of each State. In some States, the answer is conclusive; in others, it may be controverted. In either case, however, as to all statements of fact, given on the garnishee's personal knowl-

[1] Hovey *v.* Crane, 12 Pick. 167; Carrique *v.* Sidebottom, 3 Metcalf, 297; Buford *v.* Welborn, 6 Alabama, 818; Neilson *v.* Scott, 1 Rice's Digest of South Carolina Reports, 80; Murrell *v.* Johnson, 3 Hill (S. C.) 12; Smith *v.* Brown, 5 California, 118; Stedman *v.* Vickery, 42 Maine, 132; Newell *v.* Blair, 7 Michigan, 103; Ullman *v.* Eggert, 30 Illinois Appellate, 310.

[2] Davis *v.* Oakford, 11 Louisiana Annual, 379; Rose *v.* Whaley, 14 Ibid. 374; Tapp *v.* Green, 22 Ibid. 42.

[3] Thomas *v.* Fuller, 26 Louisiana Annual, 625.

[4] Pickler *v.* Rainey, 4 Heiskell, 335.

[5] Klauber *v.* Wright, 52 Wisconsin, 303. See Almy *v.* Thurber, 65 Howard Pract. 481.

edge, as well as to all declarations of his belief of facts derived from information, the answer is taken to be true;[1] in the former class of States, conclusively so; in the latter, subject to be disproved by competent evidence.

§ 652. In Massachusetts, the garnishee's liability formerly turned entirely upon his answer, and evidence collateral thereto was not admitted;[2] and so stringent was this rule, that an agreed statement of facts, signed by the garnishee, but not sworn to, and submitted by the plaintiff, defendant, and garnishee, for the decision of the Court, as to the liability of the latter, was rejected by the court.[3] In the Revised Statutes of 1836, ch. 109, § 15, there is a slight modification of the strict rule which had prevailed, in that, while it declares the answers and statements of the garnishee shall be considered as true, in deciding how far he is chargeable, it allows either party to allege and prove any other facts, *not stated nor denied by the garnishee*, that may be material in deciding that question.[4] In Michigan and Tennessee, the garnishee's liability is determined solely by his answer.[5]

§ 653. In most of the other States the answer is taken to be true, but is subject to be controverted and disproved. The effect given to it in this respect is, however, confined to its statements of facts. If the garnishee sets up rights or draws conclusions, arising out of or resulting from the facts stated, such rights and conclusions are necessarily subject to revision by the court.[6]

In Alabama, the answer is taken to be strictly true, and if a deed is appended to it, it is to be considered genuine, unless the answer be traversed.[7] In Missouri,[8] Illinois,[9] Arkansas,[10]

[1] Crossman *v.* Crossman, 21 Pick. 21; Meeker *v.* Sanders, 6 Iowa, 61.

[2] Comstock *v.* Farnum, 2 Mass. 96; Stackpole *v.* Newman, 4 Ibid. 85; Hawes *v.* Langton, 8 Pick. 67.

[3] Barker *v.* Taber, 4 Mass. 81.

[4] Gouch *v.* Tolman, 10 Cushing, 104.

[5] Maynards *v.* Cornwell, 3 Michigan, 309; Newell *v.* Blair, 7 Ibid. 103; Thomas *v.* Sprague, 12 Ibid. 120; Sexton *v.* Amos, 39 Ibid. 695; Cheatham *v.* Trotter, Peck, 198; Childress *v.* Dickins, 8 Yerger, 113.

[6] Lamb *v.* Franklin Man. Co., 18 Maine, 187.

[7] Robinson *v.* Rapelye, 2 Stewart, 86.

[8] Davis *v.* Knapp, 8 Missouri, 657; McEvoy *v.* Lane, 9 Ibid. 48; Stevens *v.* Gwathmey, Ibid. 636; Black *v.* Paul, 10 Ibid. 103; Holton *v.* South Pacific R. R. Co., 50 Ibid. 151; Ronan *v.* Dewes, 17 Missouri Appeal, 306; Reinhart *v.* Empire S. Co., 33 Ibid. 24.

[9] Kergin *v.* Dawson, 6 Illinois (1 Gilman), 86; Rankin *v.* Simonds, 27 Ibid. 352; Rippen *v.* Schœn, 92 Ibid. 229; Choate *v.* Blackford, 26 Illinois Appellate, 656; Manowsky *v.* Conroy, 33 Ibid. 141; Chicago & E. I. R. Co. *v.* Blagden, Ibid. 254.

[10] Mason *v.* McCampbell, 2 Arkansas, 506; Britt *v.* Bradshaw, 18 Ibid. 530.

Louisiana,[1] Mississippi,[2] and Minnesota,[3] the same effect is given to the answer until it is disproved.

§ 653 *a*. Where the answer is considered conclusive unless controverted, it is error to allow evidence to be given to contradict it, until issue has been regularly taken upon it.[4]

§ 654. In ascertaining the effect to be given to an answer, when assailed by opposing testimony, but few cases can be found. In Illinois, the question came up, and it was held, that the answer is not entitled to have the same effect as that of a defendant to a bill in chancery, requiring the testimony of two witnesses, or what may be equivalent, to overthrow it, but is to be considered as presenting a *prima facie* defence, liable to be rebutted by preponderating testimony.[5] In Maine, the statute says that "the answers and statements sworn to by a trustee shall be deemed true, in deciding how far he is chargeable, until the contrary is proved;" and there the court held, that the question of the garnishee's liability was to be determined by the preponderance of evidence; and in deciding it the answer of the garnishee was to be weighed and its effect determined by the general principles on which conclusions are to be drawn from any other lawful evidence.[6] In Pennsylvania, where, under the statute of 1789, the garnishee was held to be chargeable *until he discharged himself*, at least by his own oath, it was considered that the answer is *prima facie* sufficient, but that its truth might be inquired into by the jury; and that the plaintiff makes out his case merely by destroying the effect of the answer, unless the garnishee maintains the issue by other satisfactory evidence; and this the plaintiff may do by disproving the matter alleged in the answer, or by showing the garnishee to be utterly unworthy of credit. On this principle, evidence which falsifies any fact asserted in the answer goes to the credibility of the garnishee, and is therefore competent.[7] In Mississippi, it is ruled that where the truth of the answer is denied, it cannot be read to the

[1] Oakey *v.* M. & A. Railroad Co., 13 Louisiana, 570; Blanchard *v.* Vargas, 18 Ibid. 486; McDowell *v.* Crook, 10 Louisiana Annual, 81; Helme *v.* Pollard, 14 Ibid. 306; Barnes *v.* Wayland, Ibid. 791.

[2] Williams *v.* Jones, 42 Mississippi, 270.

[3] Vanderhoof *v.* Holloway, 41 Minnesota, 498.

[4] Williams *v.* Jones, 42 Mississippi, 270.

[5] Kergin *v.* Dawson, 6 Illinois (1 Gilman), 86.

[6] Kelley *v.* Weymouth, 68 Maine, 197.

[7] Adlum *v.* Yard, 1 Rawle, 163; Ellison *v.* Tuttle, 26 Texas, 283. *Sed contra*, Barnes *v.* Wayland, 14 Louisiana Annual, 791.

jury impanelled to try the issue.[1] If, however, upon such a trial the plaintiff reads the answer to the jury, it is held, in Pennsylvania, that it must be taken as *prima facie* evidence, not requiring of the garnishee other proof to establish it;[2] and in Alabama, that it has the effect only of an admission of the garnishee, and is governed by the same rules as any other admission.[3] In Missouri, the answer cuts no greater figure in the trial than the answer of a defendant in an ordinary suit, and it is not necessary for the plaintiff, in order to a recovery, to disprove the facts stated in the answer.[4] In Maryland and Michigan, the answer is regarded not as part of the pleading, but as evidence, and if any part of it be read, the whole must be; as well that which discharges as that which charges the garnishee; and the whole is to be received as *prima facie* evidence of the facts stated in it; open, however, to be rebutted.[5] In Illinois, the garnishee is entitled to have his answer before the jury, who may give it such weight as they may believe it entitled to, in connection with all the circumstances of the case.[6] In South Carolina[7] and Alabama[8] the answer is not admissible evidence in the garnishee's favor. And so in Wisconsin and in the United States District Court for the Southern District of New York.[9]

§ 655. As to the evidence which may be given against the garnishee's answer, it is held, in Missouri, that his admissions in conversation, either before or after the answer is sworn to, are admissible to disprove the statements of the answer;[10] but, in Wisconsin, that they do not amount to an estoppel.[11] And in a chancery proceeding in Kentucky, where the garnishee, who had been agent and clerk of the defendant, had, before he was garnished, frequently declared to the complainants that he had a sufficiency in his hands to pay their demand, and paid a part, and afterwards put in a partial and equivocal answer, admitting that he had a sum in his hands, collected and to be collected, but not stating how much; he was charged for the whole amount

[1] Lasley *v.* Sisloff, 7 Howard (Mi.), 157.
[2] Erskine *v.* Sangston, 7 Watts, 150.
[3] Myatt *v.* Lockhart, 9 Alabama, 91.
[4] Smith *v.* Heidecker, 39 Missouri, 157.
[5] Devries *v.* Buchanan, 10 Maryland, 210; Whitfield *v.* Stiles, 57 Michigan, 410.
[6] Schwab *v.* Gingerick, 13 Illinois, 697.
[7] Dawkins *v.* Gault, 5 Richardson, 151.
[8] Myatt *v.* Lockhart, 9 Alabama, 91; Price *v.* Mazange, 31 Ibid. 701; Sevier *v.* Throckmorton, 33 Ibid. 512.
[9] Keep *v.* Sanderson, 12 Wisconsin, 352; Cushing *v.* Laird, 6 Benedict, 408.
[10] Stevens *v.* Gwathmey, 9 Missouri, 636. See Carroll *v.* Finley, 26 Barbour, 61; McKee *v.* Anderson, 35 Indiana, 17.
[11] Warder *v.* Baker, 54 Wisconsin, 49.

of the complainant's demand.[1] In Massachusetts, on the contrary, in the cases previously referred to,[2] it was decided, that what the garnishee might have told other persons, or said, on former occasions, is immaterial, and the garnishee could not be questioned in regard thereto. It is quite certain, however, that declarations of the defendant are not admissible in evidence for the plaintiff against the garnishee;[3] nor, when made *after* the garnishment, are they evidence in his favor;[4] nor are admissions by an agent of the garnishee evidence against the latter.[5] But whatever evidence may be given to controvert his answer, must go to disprove the facts therein stated. It is not admissible for the plaintiff to assail the answer by impeaching the garnishee's credibility.[6]

§ 656. V. *The Construction to be given to the Garnishee's Answer.* The necessity of fulness and explicitness in the garnishee's answer is illustrated and enforced by the rule which has obtained in Massachusetts, in relation to doubtful expressions contained in an answer. We will trace the rise and progress of this rule.

The matter came up at an early day, in a case where the liability of the garnishee turned on the point whether a draft drawn on and accepted by him, in favor of the defendant, was negotiable. If it was, he could not, under the statute, be charged; otherwise he could. In his answer he stated his acceptance of the draft, and that *he thought* it was payable to the defendant *or order*. "But," said the court, "he must be positive as to this fact. He has had time to inquire, and he does not move the court for leave to make any further declaration on this point. If he, in whose knowledge the fact ought to be, is doubtful, the court cannot make any presumption in his favor."[7] In the next case the court go a step further, and say, "If the statement in any part be doubtful, we must construe it against the trustee, who might have used expressions in which there should be no doubt."[8] Again the court say, "The answer of a

[1] Keel *v.* Ogden, 5 Monroe, 362.

[2] *Ante*, § 643; Crossman *v.* Crossman, 21 Pick. 21; Warner *v.* Perkins, 8 Cushing, 518.

[3] Enos *v.* Tuttle, 3 Conn. 27; Cahoon *v.* Ellis, 18 Vermont, 500. And in Maryland the garnishee cannot, to discharge himself, give in evidence the declarations and admissions of the defendant. Thomas *v.* Price, 30 Maryland, 483.

[4] Warren *v.* Moore, 52 Georgia, 562.

[5] Baltimore & Ohio R. R. Co. *v.* Gallahue, 12 Grattan, 655.

[6] Barnes *v.* Wayland, 14 Louisiana Annual, 791. *Sed contra*, Adlum *v.* Yard, 1 Rawle, 163.

[7] Sebor *v.* Armstrong, 4 Mass. 206.

[8] Cleveland *v.* Clap, 5 Mass. 201. See Sampson *v.* Hyde, 16 New Hamp. 492.

trustee, being his own language, must unquestionably in all cases be construed most strongly against himself. But his language is not to be distorted nor forced into any unnatural construction; nor can inferences be drawn from any real or supposed discrepancies in his answers, against the fair and natural import of the language taken altogether."[1] The rules laid down in these cases were applied by the same court to a case where the question of the garnishee's liability turned on a statement in his answer with regard to the disposition made of certain provisions, *the most* of which, he said, had been consumed in a particular way. If they had *all* been so consumed, the garnishee would not be charged; otherwise he might be. The court adjudged him liable, because he did not answer with sufficient precision, when it was in his power to have done so.[2] Subsequently, the rule was limited in its application to cases where the garnishee, in some part of his answer, makes statements, which unexplained would *prima facie* subject him to liability.[3] The last case cited seems to be one of this character. There, the garnishee was *prima facie* liable, and endeavored to avoid liability by a statement concerning the provisions in his hands. That statement being deficient in precision and fulness, the court would not receive it as a protection against the *prima facie* liability appearing by the answer.[4]

§ 657. In Louisiana, the statute declares that a garnishee's "refusal or neglect to answer interrogatories shall be considered as a confession of his having in his hands property belonging to the debtor, sufficient to satisfy the demand made against this debtor." Under this provision this question was put to the garnishee, "Have you received cotton or other produce from the defendants or from any member of the firm? At what time? How much cotton or produce?" The garnishee answered, "that he had received cotton from the defendants, for account of other persons, which had been duly appropriated according to directions received with said cotton, previous to the service of the attachment or garnishment in this case." The answer was held to be evasive, and not responsive to the question, and the garnishee

[1] Kelly v. Bowman, 12 Pick. 383. See United States v. Langton, 5 Mason, 280; Giddings v. Coleman, 12 New Hamp. 153; Sampson v. Hyde, 16 Ibid. 492; Scott v. Ray, 18 Pick. 360; Ormsbee v. Davis, 5 Rhode Island, 442.

[2] Graves v. Walker, 21 Pick. 160.

[3] Shearer v. Handy, 22 Pick. 417.

[4] Toothaker v. Allen, 41 Maine, 324; Whitney v. Kelly, 67 Ibid. 377.

was charged.[1] But though the answer to one of several interrogatories be not full and explicit, yet if it be, in fact, explicitly answered by the answers given to other interrogatories, that is sufficient.[2]

§ 658. This subject elicited from the late Justice STORY the following judicious remarks, which, though applicable to the peculiar system of Maine, will be regarded favorably in all cases where the question of the garnishee's liability is to be decided by the terms of his answer: "It is said that where parties, summoned as trustees, fail to discharge themselves, by any ambiguity in their disclosures, they are to be adjudged trustees. That proposition requires many qualifications, and may be true or not, according to circumstances. If upon the disclosure it is clear that there are goods, effects, or credits of the debtor in the hands of a trustee, but it is left uncertain by the disclosure whether the goods, effects, or credits are affected by interests, liens, or claims of third persons or not, and the trustee has knowledge of all the facts, and withholds them, or evades a full examination; that may furnish a good ground to presume everything against him, so far as there are ambiguities. But if he fully and clearly discloses all he knows, and upon the whole evidence it is left in reasonable doubt whether, under all the circumstances, he be trustee or not; in such case, I appprehend, he is entitled to be discharged. A different doctrine would be most perilous to the supposed trustee; because he possesses no power to compel disclosures from third persons relative to the property; and no extraneous or collateral evidence of third persons is admissible in the suit, to establish or discharge his liability. It is to be decided solely and exclusively by his answer. He might, upon any other doctrine, be innocently compelled to pay over the same property twice to different persons holding adverse rights, because he might be without any adequate means of self-protection. The law, therefore, will not adjudge him a trustee, except upon clear and determinate evidence drawn from his own answers."[3] In another case the same eminent jurist said: "I agree that doubtful expressions may be construed most strongly against the trustees, if they admit of two interpretations; but they are not to be tortured into an adverse meaning or admission. The answers are not to be more rigidly, or differ-

[1] Hart v. Dahlgreen, 16 Louisiana, 559.
[2] Maduel v. Mousseaux, 28 Louisiana Annual, 691.
[3] Gordon v. Coolidge, 1 Sumner, 537.

ently construed from what they would be in a bill in chancery. If the answers are not full, the plaintiff is at liberty to propound closer interrogatories; but he is not to charge parties upon a mere slip or mistake of certainty, or because they do not positively answer what in conscience they do not positively know."[1]

[1] United States v. Langton, 5 Mason, 280.

CHAPTER XXXIV.

JUDGMENT AGAINST THE GARNISHEE.

§ 658 *a*. We have seen that an indispensable prerequisite to a judgment against the garnishee is the rendition of a judgment against the defendant.[1] There is no doubt that that fact should be shown in the record; else the judgment against the garnishee will appear without foundation.[2] But the question arises, What constitutes the record in a garnishment proceeding? and this depends upon the manner in which that proceeding is instituted. If the garnishee is summoned under an attachment, the true view seems to be, that the garnishment, though in some sense a distinct suit, belongs to, and is a part of, the record in the attachment suit.[3] But there are two other modes in which garnishees may be summoned in courts of law, viz.: 1. By a statutory proceeding under a judgment, but not under an execution on the judgment; and 2. By a statutory proceeding under an execution. In the former, there is necessarily some step to be taken by the judgment plaintiff, to initiate the garnishment; in the latter, there is generally nothing required but the issue of an execution, under which garnishees may be summoned, as under an attachment. In the latter form of proceeding, the record of the case against the garnishee is the execution, the return of the officer thereon, the interrogatories to, and answer of, the garnishee, and the judgment; and in such a record the date and amount of the judgment against the defendant necessarily and sufficiently appear by the execution. But in the other case, how is the fact of the rendition of the judgment, or

1. *Ante*, § 460.

2 Zurcher *v.* Magee, 2 Alabama, 253; Blair *v.* Rhodes, 5 Ibid. 618; Case *v.* Moore, 21 Ibid. 758; Bean *v.* Barney, 10 Iowa, 498; Toll *v.* Knight, 15 Ibid. 370.

3 Faulks *v.* Heard, 31 Alabama, 516. See Wyman *v.* Stewart, 42 Alabama, 163, where it was held, that the answer, although not made a part of the bill of exceptions, nor by any order of court made a part of the record, but was yet referred to and identified in the judgment entry, should be treated as part of the record. In Rankin *v.* Simonds, 27 Illinois, 352, it was held, that the interrogatories to, and answer of, the garnishee are part of the record, and need not be preserved by a bill of exceptions.

the amount thereof, to appear? In Tennessee, in a contest between a garnishment under a proceeding by attachment in equity, and a garnishment under an execution, it was held, that the neglect to file a certified copy of the judgment upon which the execution issued, was a fatal omission; from which holding it is inferable that it would have been sufficient to produce such copy.[1] In the same State, a notice of garnishment under an execution was held fatally defective, which did not state in whose favor the execution was, nor upon what judgment it was issued, nor what amount the execution plaintiff claimed to be entitled to collect from the garnishee.[2] In Alabama, in such case, it is necessary for the judgment plaintiff, in order "to obtain process of garnishment against any person supposed to be indebted to the defendant, in any cause *where execution cannot issue on the judgment*, to make affidavit that such person is supposed to be indebted to, or have effects of the defendant in his possession or under his control, and that he believes process of garnishment against such person is necessary to obtain satisfaction of such judgment." The record in such a case would consist of the affidavit and summons, the return of the officer, and the interrogatories, answer, and judgment in the garnishment proceeding. The judgment against the defendant is, properly speaking, no portion of the record, unless incorporated into the judgment against the garnishee, or made part of the record by a bill of exceptions.[3] In Alabama, it was at one time held, that a judgment against the garnishee in such a proceeding was fatally defective, because it did not *recite* the amount of the judgment against the defendant;[4] but the court afterwards decided that the recital of the fact and amount of the recovery against the defendant, in the entry of the judgment against the garnishee, is the duty of the clerk; and the omission is a clerical error, which may be corrected on motion, even at a subsequent term.[5] It should be enough if, in any way, in the record of the garnishment proceeding, the amount of that judgment appears. And this was the view taken by the Supreme Court of Alabama, where the affidavit set forth the date and amount of the judgment against the defendant, and the judgment entry against the gar-

[1] Alley *v.* Myers, 2 Tennessee Ch'y, 206. See Miller *v.* Wilson, 86 Tennessee, 495.

[2] Walton *v.* Sharp, 11 Lea, 578.

[3] Gunn *v.* Howell, 27 Alabama, 663; Faulks *v.* Heard, 31 Ibid. 516; Gould *v.* Meyer, 36 Ibid. 565.

[4] Faulks *v.* Heard, 31 Alabama, 516; Chambers *v.* Yarnell, 37 Ibid. 400.

[5] Whorley *v.* M. & C. R. R. Co., 72 Alabama, 20; Memphis & C. R. R. Co. *v.* Whorley, 74 Ibid. 264.

nishee recited that he waived objection to the rendition of a judgment against him, because of its not appearing, as required by the terms of the statute above quoted, *that no execution could issue on the judgment* against the defendant. The court held, that his admission, contained in this waiver and his answer, was an admission of the existence of the judgment described in the affidavit, and was sufficient proof, as against him, of that fact.[1] But where, in such a proceeding, the affidavit did not show the amount of the judgment against the defendant, it was held, that any judgment against the garnishee was erroneous.[2]

§ 658 *b*. It is not necessary, unless required by statute, that the judgment against the garnishee should be taken at the time of that against the defendant. Forbearance of the plaintiff to take it then, is no waiver of his right to do so afterward.[3] In Alabama it is held, that when a garnishee submits to answer, he continues before the court, for the purpose of receiving its judgment upon his answer, until after judgment shall have been rendered against the defendant;[4] and that judgment may be rendered against the garnishee at a term subsequent to that at which it was given against the defendant;[5] and that in such case, the garnishee is not entitled to notice of the motion for the judgment.[6] And in Louisiana, in a case where the garnishee's answer had been suffered to remain six years without any proceeding upon it, it was not regarded as releasing him from the jurisdiction of the court, but, coupled with other facts, as having great weight with the court in relieving him against any proceedings which might be hard or precipitate against him.[7] And in the Philadelphia District Court it was ruled, that an attachment should not be dissolved because of the lapse of fourteen years after the judgment, without the plaintiff's taking out a *scire facias* against the garnishee.[8]

[1] Jackson *v.* Shipman, 28 Alabama, 488.

[2] Stickley *v.* Little, 29 Illinois, 315.

[3] Sturges *v.* Kendall, 2 Louisiana Annual, 565; Phillips *v.* Germon, 43 Iowa, 101.

[4] Graves *v.* Cooper, 8 Alabama, 811; Lockhart *v.* Johnson, 9 Ibid. 223; Bostwick *v.* Beach, 18 Ibid. 80.

[5] Leigh *v.* Smith, 5 Alabama, 583; Robinson *v.* Starr, 3 Stewart, 90.

[6] Leigh *v.* Smith, 5 Alabama, 583.

[7] Slatter *v.* Tiernan, 6 Louisiana Annual, 567. The failure of an attaching plaintiff, for many years, to prosecute a garnishment proceeding to judgment against the garnishee, and the intervening insolvency of the garnishee, do not deprive the plaintiff of his right to prosecute his claim against the defendant to judgment. Noble *v.* Merrill, 48 Maine, 140.

[8] Weber *v.* Carter, 1 Philadelphia, 221.

§ 658 *bb*. The death of a garnishee, after his answer, arrests all proceedings as to him, and a judgment rendered against him then is erroneous. Though the garnishee's death will have no effect upon the main action, yet no further proceeding can be had except against his personal representative; which may be done by *scire facias* if no other statutory mode be prescribed. If the garnishee, at his death, had in his hands specific chattels belonging to the defendant, which go into the hands of his representative, the court may compel them to be delivered up for application to the plaintiff's judgment when recovered.[1] A judgment *de bonis testatoris* against an executor as garnishee binds neither the testator's estate, nor the executor personally.[2]

§ 658 *c*. When in an attachment suit, the question arises whether there shall be a judgment against the garnishee, the case is ordinarily between him and the plaintiff alone; but the defendant is not wholly cut off from interfering to prevent the judgment. If his property in the garnishee's hands is by law exempt from execution;[3] or if the attachment has been dissolved by the defendant's giving bail;[4] or if the debt due from the garnishee to him be such as the law forbids being reached by garnishment;[5] or if the judgment against the defendant has been satisfied;[6] he may interpose to prevent a judgment against the garnishee. If he fail to do so until after the money in the garnishee's hands has been paid to the attaching creditor, he is without remedy.[7] But he cannot set up, on behalf of the garnishee, a personal exemption from garnishment; this can be done only by the garnishee. Thus, where an incorporated city was garnished, and the defendant attempted to interpose the objection that a municipal corporation could not be held as garnishee, it was decided that he had no right to do so.[8] Nor can he move to discharge the garnishee on account of jurisdictional defect in the writ under which the garnishee was summoned, when the defect had been amended with his consent and that of the garnishee.[9]

§ 658 *d*. Nothing is more important in the taking of a judgment against a garnishee, than that he should have had a fair

[1] Parker *v.* Parker, 2 Hill Ch'y, 35.
[2] Bickle *v.* Chrisman, 76 Virginia, 678.
[3] Wigwall *v.* Union C. & M. Co., 37 Iowa, 129.
[4] Myers *v.* Smith, 29 Ohio State, 120.
[5] Oakes *v.* Marquardt, 49 Iowa, 643.
[6] *Ante*, § 459.
[7] Iliff *v.* Arnott, 31 Kansas, 672.
[8] Wales *v.* Muscatine, 4 Iowa, 302; Burton *v.* District Township, 11 Ibid. 166.
[9] Barry *v.* Hogan, 110 Mass. 209.

hearing before the court on the question of his liability. If that be denied him, the judgment against him will be reversed by the revising tribunal. Thus, where a garnishee, on an examination before a commissioner, refused to answer a certain interrogatory, on the ground that it was impertinent, and the question was submitted to the court whether he was legally bound to answer, and the court decided that he was, but refused to permit him, though he offered to do so, and rendered judgment against him; the judgment was reversed, on the ground that it was the duty of the court either to have recommitted the whole matter to the commissioner for further investigation, or to have taken the answer in open court.[1]

§ 658 *e*. In many States, a judgment by default may be taken against a garnishee upon his failing to answer. If he permit such a judgment, when in fact he ought not to be charged, because neither a debtor to, nor holding effects of, the defendant, he is *prima facie* guilty of negligence, and can obtain no relief, unless, by rebutting the presumption of negligence, he can induce the court to set aside the judgment, and give him leave to answer. It is not such a case as a court of equity will interfere in, though he show that the judgment is inequitable. To entitle himself to equitable relief, he must not only show that injustice has been done him by the judgment, but that the judgment was obtained without any fault or neglect on his part.[2] Much less can he, after paying the judgment obtained against him, maintain an action against the attachment plaintiff to recover back the amount paid, on the ground that he did not in fact owe the defendant anything.[3]

When a garnishee in default comes into court, seeking to be allowed to answer, the default will not be set aside unless he show a sufficient excuse for his failure to appear and answer at the proper time. He cannot carelessly or obstinately fail to appear when required, and afterwards come in and enter his appearance, with all the rights and privileges of one who has been diligent in responding in the first instance. A negligent garnishee is no more entitled to protection than any other negligent party.[4] And he is as much bound to look after the proceedings

[1] Sawyer *v.* Webb, 5 Iowa, 315.

[2] Hair *v.* Lowe, 19 Alabama, 224; Peters *v.* League, 13 Maryland, 58; Windwart *v.* Allen, Ibid. 196; Atlantic F. & M. Ins. Co. *v.* Wilson, 5 Rhode Island, 479; Rhode Island Ex. Bank *v.* Hawkins, 6 Ibid. 198; Danaher *v.* Prentiss, 22 Wisconsin, 311; Freeman *v.* Miller, 51 Texas, 443; Oregon R. & N. Co. *v.* Gates, 10 Oregon, 514.

[3] Segog *v.* Engle, 43 Minnesota, 191.

[4] Fifield *v.* Wood, 9 Iowa, 250; Par-

against him, and protect himself from an improper judgment, as a defendant in an ordinary suit is. If, by his failure in this respect, the plaintiff gain an advantage over him, he is without relief. Thus, where a garnishee answered, denying indebtedness to the defendant, and afterwards the case was taken by change of venue to another county, where the plaintiff filed a replication to the answer taking issue thereon, of which no notice was given the garnishee, and upon a trial a verdict was found against the garnishee, which he moved to set aside; it was held, that it was his duty to take notice of what was done in the case, the same as any other party, and to follow the case; and being in default in this respect, the judgment against him could not be set aside.[1]

In Louisiana, if a garnishee fails to answer the interrogatories propounded to him, the court orders them to be taken for confessed; and under this system of practice it was held, that such an order might, in the sound discretion of the court, be set aside, and the garnishee be allowed to answer, where the order was made *before* judgment was obtained against the defendant; inasmuch as, until that event, the taking of the interrogatories for confessed could be of no benefit to the plaintiff.[2]

In Illinois it is held, that a refusal by the court to set aside a judgment by default against a garnishee will not be reviewed by the appellate court;[3] and in Georgia, that the discretion of a court in setting aside such a judgment will not be reviewed, where it appeared that the garnishee was charged for more than he actually owed the defendant, and that in not answering he acted under a mistake of his legal duty, and not in bad faith.[4] But if the garnishee is led by the plaintiff's conduct to believe that the garnishment was no longer to be pressed against him, and he therefore does not answer, a judgment by default against him will be set aside.[5]

In Pennsylvania, on a motion to open a judgment by default against a grossly negligent garnishee, the court refused the motion unless the garnishee should present the most satisfac-

menter *v.* Childs, 12 Ibid. 22; Willet *v.* Price, 32 Georgia, 115; Freidenrich *v.* Moore, 24 Maryland, 295; Anderson *v.* Graff, 41 Ibid. 601; Lawrence *v.* Smith, 45 New Hamp. 533; Fretwell *v.* Laffoon, 77 Missouri, 26; Fletcher *v.* Wear, 81 Ibid. 524; Montanye *v.* Husted, 3 Luzerne Legal Register, 325; Melton *v.* Lewis, 74 Texas, 411.

[1] Chase *v.* Foster, 9 Iowa, 429.

[2] Rose *v.* Whaley, 14 Louisiana Annual, 374.

[3] United States Express Co. *v.* Bedbury, 34 Illinois, 459.

[4] Russell *v.* Freedmen's Savings Bank, 50 Georgia, 575. See Evans *v.* Mohn, 55 Iowa, 302.

[5] Platen *v.* Byck, 50 Georgia, 245.

tory proof that upon a trial no recovery ought to be had against him.[1]

§ 658 *f*. In Rhode Island, if a garnishee neglects to render an account, on oath, of what personal estate, belonging to the defendant, he had in his hands at the time he was served with garnishment process, the law declares that he shall be liable, in an action on the case, to satisfy the judgment recovered against the attachment defendant. In an action of that description, tried before a jury, where a verdict was rendered against the defendant, he moved in arrest of judgment, on the ground that the law authorizing the action was in conflict with the clause of the Constitution of the State, which declares that no person shall be "deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land;" and with the Fourteenth Amendment of the Constitution of the United States, which declares that no State shall "deprive any person of life, liberty, or property without due process of law." The court overruled the motion in arrest, and ordered judgment to be entered on the verdict; and in its opinion thus stated the point of the case: "The counsel for the defendant contends that he ought to be permitted to show in the action against him what estate he has in his hands belonging to the original defendant, or how much he is indebted to the original defendant, and that the judgment in favor of the plaintiff ought to be limited to the amount of such estate or indebtment. Undoubtedly this would be so if the defendant had not already had the opportunity to show the amount, and by showing, to limit his liability to it. The question is whether, having once had and neglected or refused the opportunity, he is entitled to have it a second time, or whether it is within the power of the legislature to provide that, upon proof of such neglect or refusal, he shall be charged to the full extent of the original judgment in consequence of his neglect or refusal, without regard to the estate in his hands. We know of no reason why it has not such a power. No authority is cited to show that it has not."[2]

§ 658 *g*. A garnishee in default is as much entitled as a defendant would be to a strict observance of the steps prescribed by law as preliminary to a final judgment against him. Thus, under a statute which provided that "if the garnishee fail to

[1] Montanye *v.* Husted, 3 Luzerne Legal Register, 325.

[2] Vaughan *v.* Furlong, 12 Rhode Island, 127.

appear and answer, a conditional judgment must be rendered against him for the amount of the plaintiff's claim, as ascertained by the judgment, to be made absolute if he does not appear within the first three days of the next term and answer," a final judgment against the garnishee was reversed because no conditional judgment was entered, though at the end of the record entry of the judgment against the defendant these words were added: "Judgment *nisi* as to John T. Bonner and other garnishees, answer on file, and cont'd." These words were held not to amount to a judgment at all.[1] And where the law required that, in order to obtain a writ of garnishment under a judgment, an affidavit should be filed; and a writ was issued without the required affidavit; and the writ recited the judgment as for $220.87, when in fact it was for $2,020.87; and judgment by default was taken against the garnishee for the latter sum; it was set aside because the plaintiff could take such judgment for no more than the amount specified in the writ; and the writ was quashed because there was no affidavit.[2]

§ 659. Where the garnishee's liability is to be determined by his answer, either because it is by law conclusive, or because the plaintiff does not see proper to controvert its statements, the rules governing the judgment to be rendered thereon are few and simple. They may be briefly stated thus: —

1. In order to charge the garnishee on his answer, there must be in it a clear admission of a debt due to, or the possession of money or other attachable property of, the defendant.[3]

[1] Bonner *v.* Martin, 37 Alabama, 83; Goode *v.* Holcombe, Ibid. 94. See Johnson *v.* McCutchings, 43 Texas, 553.

[2] Hoffman *v.* Simon, 52 Mississippi, 302.

[3] Wetherill *v.* Flanagan, 2 Miles, 243; Bridges *v.* North, 22 Georgia, 52; Thompson *v.* Fischesser, 45 Ibid. 369; Allen *v.* Morgan, 1 Stewart, 9; Presnall *v.* Mabry, 3 Porter, 105; Smith *v.* Chapman, 6 Ibid. 365; Mims *v.* Parker, 1 Alabama, 421; Foster *v.* Walker, 2 Ibid. 177; Fortune *v.* State Bank, 4 Ibid. 385; Connoley *v.* Cheeseborough, 21 Ibid. 166; Powell *v.* Sammons, 31 Ibid. 552; Estill *v.* Goodloe, 6 Louisiana Annual, 122; Coe *v.* Rocha, 22 Ibid. 590; Harney *v.* Ellis, 11 Smedes & Marshall, 348; Brown *v.* Slate, 7 Humphreys, 112; Lorman *v.* Phœnix Ins. Co., 33 Michigan, 65; Spears *v.* Chapman, 43 Ibid. 541; Weirich *v.* Scribner, 44 Ibid. 73; Sherman *v.* Joslin, 52 Ibid. 474; Davis *v.* Pawlette, 3 Wisconsin, 300; Wilson *v.* Albright, 2 G. Greene, 125; Pierce *v.* Carleton, 12 Illinois, 358; People *v.* Johnson, 14 Ibid. 342; Bliss *v.* Smith, 78 Ibid. 359; Cairo & St. L. R. R. Co. *v.* Killenberg, 82 Ibid. 295; Cairo & St. L. R. R. Co. *v.* Hindman, 85 Ibid. 521; Ellicott *v.* Smith, 2 Cranch C. C. 543; Porter *v.* Stevens, 9 Cushing, 530; Lomerson *v.* Huffman, 1 Dutcher, 625; Williams *v.* Housel, 2 Iowa, 154; Hunt *v.* Coon, 9 Indiana, 537; Reagan *v.* Pacific Railroad, 21 Missouri, 30; Driscoll *v.* Hoyt, 11 Gray, 404; Smith *v.* Clarke, 9 Iowa, 241; Morse *v.* Marshall, 22 Ibid. 290; Church *v.* Simpson, 25 Ibid. 408; Fithian *v.* Brooks, 1 Philadelphia, 260; Allegheny Savings Bank *v.* Meyer, 59

2. Where there is not an explicit admission of a debt, but, from the statements of the answer, indebtedness to, or the possession of attachable property of, the defendant, clearly appears, judgment should go against the garnishee.[1] And in arriving at the facts, the plain and natural import of the language of the answer, taken together, must control, and the garnishee is to be charged or not, according as the evidence afforded by the whole answer preponderates.[2]

3. If there be a debt due from the garnishee, or money in his hands, the amount of either will determine the extent of the garnishee's liability; not exceeding in any case the amount for which the plaintiff recovers judgment against the defendant.[3]

4. If the garnishee have property other than money, or have rendered services for the defendant, the value thereof, in either case, must appear in the answer, or there can be no judgment for the plaintiff on the answer; for there is nothing from which the court could find a definite amount.[4]

5. Where the garnishee denies being indebted to, or having in his possession attachable property of, the defendant;[5] or his answer, though vague and inartificially drawn, contains substantially a denial thereof;[6] judgment must be rendered in his favor, unless, from the statements of the answer, it appear that the denial is untrue; in which case the denial will be disregarded and judgment rendered against him.[7]

6. Where he neither expressly admits nor denies his liability, but states all the facts, and leaves the court to decide the matter of law arising thereon, there can be no judgment against him, unless there clearly appear on the face of those facts sufficient to justify the court in pronouncing such judgment.[8] If it be left in reasonable doubt whether he is chargeable or not, he is enti-

Penn. State, 361; Pickler v. Rainey, 4 Heiskell, 335.

[1] Baker v. Moody, 1 Alabama, 315; Mann v. Buford, 3 Ibid. 312; Pickler v. Rainey, 4 Heiskell, 335; Donnelly v. O'Connor, 22 Minnesota, 309.

[2] Cardany v. N. E. Furniture Co., 107 Mass. 116.

[3] Hitchcock v. Watson, 18 Illinois, 289; Talbott v. Tarlton, 5 J. J. Marshall, 641; Wilcox v. Mills, 4 Mass. 218; Sanford v. Bliss, 12 Pick. 116; Meacham v. McCorbitt, 2 Metcalf, 352; Allen v. Hall, 5 Ibid. 263; Brown v. Silsby, 10 New Hamp. 521; Burrus v. Moore, 63 Georgia, 405.

[4] Bean v. Bean, 33 New Hamp. 279.

[5] Wright v. Foord, 5 New Hamp. 178; Jones v. Howell, 16 Alabama, 695; McRee v. Brown, 45 Texas, 503; Cairo & St. L. R. R. Co. v. Killenberg, 92 Illinois, 142.

[6] Smith v. Bruner, 23 Mississippi, 508.

[7] Wright v. Foord, 5 New Hamp. 178; Perine v. George, 5 Alabama, 641; Bebb v. Preston, 1 Iowa, 460; Donnelly v. O'Connor, 22 Minnesota, 309.

[8] United States v. Langton, 5 Mason, 280; Picquet v. Swan, 4 Ibid. 443; Rich v. Reed, 22 Maine, 28; Oliver v. Atkinson, 2 Porter, 546; Frost v. Patrick, 3 Smedes & Marshall, 783; Williams v. Jones, 42 Mississippi, 270.

tled to a judgment in his favor.[1] If he disclose an assignment to a third party of his debt to the defendant, judgment cannot be rendered against him.[2]

7. Where the answer of the garnishee discloses circumstances which raise a question of fraud in the title to property in his hands, the court will not take cognizance of, and decide that question on the answer alone, it being a question which should be referred to a jury.[3]

8. Where the garnishee alleges that he was induced by false and fraudulent representations made by the defendant, who knew them to be false, to enter into the contract with the defendant, in regard to which it is sought to charge him; he cannot be charged on his answer on that account.[4]

[1] Gordon *v.* Coolidge, 1 Sumner, 537; Pierce *v.* Carleton, 12 Illinois, 358; Banning *v.* Sibley, 3 Minnesota, 389; Pioneer Printing Co. *v.* Sanborn, Ibid. 413; Schafer *v.* Vizena, 30 Ibid. 387; Morse *v.* Marshall, 22 Iowa, 290.

[2] Button *v.* Trader, 75 Michigan, 295.

[3] Rich *v.* Reed, 22 Maine, 28.

[4] Fay *v.* Sears, 111 Mass. 154.

CHAPTER XXXV.

EXTENT OF GARNISHEE'S LIABILITY AS TO AMOUNT, AND AS TO THE TIME TO WHICH THE GARNISHMENT RELATES.

§ 660. As an attaching creditor can acquire, through the attachment, no greater rights against the garnishee than the defendant has, except in cases of fraud, it follows that the extent of the garnishee's liability is to be determined by the value of the defendant's property in his hands, or the amount of the debt due from him to the defendant.[1] The garnishee is a mere stakeholder between the parties, and it would be manifestly unjust, as long as he holds that position, to subject him to a judgment for a greater amount than that in his hands. Where, therefore, one is summoned as garnishee in several actions, and discloses in any of them that judgment has been rendered against him in a prior case for the whole amount in his hands, he will be discharged, unless the plaintiff in the prior suit can make his debt otherwise than by recourse to the garnishee.[2]

§ 661. It is a recognized right of a garnishee to discharge himself from personal liability, by delivering into court the property of the defendant which is in his hands. In such case the property is wholly within the control of the court, and the garnishee is relieved from all responsibility therefor, and is not considered as having any further connection with or concern in the proceedings. It was, therefore, held, that under such circumstances he could not prosecute a writ of error to a decision of the court disposing of the property.[3]

[1] *Ante*, § 458; Talbott *v.* Tarlton, 5 J. J. Marshall, 641; Wilcox *v.* Mills, 4 Mass. 218; Sanford *v.* Bliss, 12 Pick. 116; Meacham *v.* McCorbitt, 2 Metcalf, 352; Allen *v.* Hall, 5 Ibid. 263; Brown *v.* Silsby, 10 New Hamp. 521; Burton *v.* District Township, 11 Iowa, 166; Peet *v.* Whitmore, 16 Louisiana Annual, 48; Woodhouse *v.* Commonwealth Ins. Co., 54 Penn. State, 307; Coble *v.* Nonemaker, 78 Ibid. 501; St. Louis *v.* Regenfuss, 28 Wisconsin, 144; Healey *v.* Butler, 66 Ibid. 9.

[2] Bullard *v.* Hicks, 17 Vermont, 198. See Robeson *v.* M. & A. Railroad Co., 13 Louisiana, 465.

[3] Lewis *v.* Sheffield, 1 Alabama, 134. See Bickle *v.* Chrisman, 76 Virginia, 678.

§ 662. The garnishee will not, where he does not assume the attitude of a litigant, be chargeable with the costs of the proceedings against him, or of those against the defendant, unless it appear that he has sufficient in his hands for that purpose, after satisfying the debt.[1] But if he denies indebtedness, and an issue is formed to try the fact, the proceedings assume all the nature and formalities of a suit between the plaintiff and the garnishee, and all the consequences of a suit attend them. It is no longer a case in which the garnishee merely complies with the process of the court, occupying more the character of a witness than a party, but he is, to every intent, a party; and may summon witnesses, obtain continuances, etc., and swell the costs as much as the defendant could have done. In such a case, if the issue be found against him, he is liable to a judgment for the costs which have accrued on the garnishment proceedings, though there be no statute on the subject.[2] And so, if the garnishee refuses to answer, or seeks to avoid a fair investigation of his liability, he is chargeable with any costs occasioned by such conduct.[3] And so, if the amount due from him to the defendant be in controversy, and the plaintiff establish that there is more in the garnishee's hands than he admitted. But if the garnishee's admission be sustained, he is not liable for costs.[4]

§ 663. Whatever the amount of the garnishee's indebtedness to the defendant, or of the defendant's effects in his hands, over and above that of the plaintiff's judgment against the latter, no judgment can be taken against him for more than sufficient to cover the plaintiff's claim against the defendant, and costs.[5]

[1] Gracy *v.* Coates, 2 McCord, 224; Walker *v.* Wallace, 2 Dallas, 113; Witherspoon *v.* Barber, 3 Stewart, 335; Breading *v.* Siegworth, 29 Penn. State, 396; Tupper *v.* Cassell, 45 Mississippi, 352; Prout *v.* Grout, 72 Illinois, 456; Johnson *v.* Delbridge, 35 Michigan, 436; Baltimore, O., & C. R. R. Co. *v.* Taylor, 31 Indiana, 24; Little Wolf R. I. Co. *v.* Jackson, 66 Wisconsin, 42.

[2] Thompson *v.* Allen, 4 Stewart & Porter, 184; Newlin *v.* Scott, 26 Penn. State, 102; Breading *v.* Siegworth, 29 Ibid. 396; Herring *v.* Johnson, 5 Philadelphia, 443; Lucas *v.* Campbell, 88 Illinois, 447; Hannibal & St. J. R. R. Co. *v.* Crane, 102 Ibid. 249; Strong *v.* Hollon, 39 Michigan, 411; Schooler *v.* Alstrom, 38 Louisiana Annual, 907; Webster Wagon Co. *v.* Peterson, 27 West Virginia, 314.

[3] Randolph *v.* Heaslip, 11 Iowa, 37.

[4] Newlin *v.* Scott, 26 Penn. State, 102; Breading *v.* Siegworth, 29 Ibid. 396.

[5] Tyler *v.* Winslow, 46 Maine, 348; Hitchcock *v.* Watson, 18 Illinois, 289; Doggett *v.* St. Louis M. & F. Ins. Co., 19 Missouri, 201; Timmons *v.* Johnson, 15 Iowa, 23. The rule stated in the text, it will be noticed, applies to systems of practice, prevalent everywhere, I think, except in Illinois, authorizing the judgment against the garnishee to be rendered in favor of the plaintiff. In that State, however, when a garnishee is liable, the judgment is rendered in favor of the defendant, for the benefit of such

And as the judgment against him is only intended to secure the satisfaction of that against the defendant, if the plaintiff obtain satisfaction in part by other means, he can proceed against the garnishee for no more than the unsatisfied remainder;[1] and if he obtain satisfaction in full, his recourse against the latter is at an end.[2]

§ 664. In this connection comes the question of the garnishee's liability for interest on his debt to the defendant, *pendente lite*. If he has put the defendant's money at interest, he is liable for the interest.[3] And where the plaintiff attaches in his own hands a debt he owes to the defendant, interest thereon continues to run during the pendency of the attachment.[4] But where a third person is subjected to garnishment, whether he shall be required to pay interest on his debt during the time he is restrained by the attachment from paying the debt, is a matter which has been much discussed.

§ 665. In deciding this question, the first point to be inquired into is, whether the garnishee's debt to the defendant is one bearing interest by agreement, or whether the interest for which it is sought to charge him accrues by way of damages. If there was no contract of the garnishee to pay interest, he cannot be charged with it; for the plaintiff can hold him for no more than the defendant could.[5] If the interest accrues by way of damages for a wrongful detention of the principal sum by the debtor, he cannot be charged with it, because, having been restrained by the garnishment from paying his debt, he is in no fault for not paying, and there is therefore no wrongful detention, and therefore no liability for damages.[6] But where the garnishee's debt is one which by contract bears interest, the latter is as much a

attaching and judgment creditors as are entitled to share in its proceeds; and there the judgment is for the whole debt of the garnishee to the defendant, though it be more than is needed to satisfy the attachment; and if more, the surplus is for the benefit of the defendant. Stahl *v.* Webster, 11 Illinois, 511; Webster *v.* Steele, 75 Ibid. 544.

[1] *Post*, § 673; Spring *v.* Ayer, 23 Vermont, 516.

[2] Thompson *v.* Wallace, 3 Alabama, 132; Price *v.* Higgins, 1 Littell, 274; Chanute *v.* Martin, 25 Illinois, 63.

[3] Brown *v.* Silsby, 10 New Hamp. 521; Blodgett *v.* Gardiner, 45 Maine, 542; Abbott *v.* Stinchfield, 71 Ibid. 213.

[4] Willing *v.* Consequa, Peters C. C. 301.

[5] Lyman *v.* Orr, 26 Vermont, 119; Adams *v.* Cordis, 8 Pick. 260; Quigg *v.* Kittredge, 18 New Hamp. 137.

[6] Prescott *v.* Parker, 4 Mass. 170; Adams *v.* Cordis, 8 Pick. 260; Swamscot Machine Co. *v.* Partridge, 5 Foster, 369; Irwin *v.* Pittsburgh & C. R. R. Co., 43 Penn. State, 488.

part of the debt as the principal; and it is in reference to such cases that the question of the garnishee's liability for interest has most frequently arisen. On this point, it may be laid down as a general proposition, that a garnishee ought not to be charged with interest on his debt to the defendant, while he is, by the legal operation of an attachment, restrained from making payment;[1] whether the attachment terminate in favor of the plaintiff or the defendant.[2] This applies, however, only to cases where the garnishee stands in all respects *rectus in curia*, as a mere stakeholder, and not as a litigant; and it has received important qualifications, which have in reality almost unsettled it. The courts have gone into inquiries as to whether the garnishee used the money during the pendency of the attachment; and as to the existence of fraud, or collusion, or unreasonable delay occasioned by the conduct of the garnishee; and various decisions have been given, to which we will now direct attention.

In Pennsylvania, the general rule is as above stated; but if there is any fraud, collusion, or unreasonable delay occasioned by the conduct of the garnishee, he will be charged with interest.[3]

In the Circuit Court of the United States for Pennsylvania, the presumption was allowed in favor of the garnishee that he had not used the money during the pendency of the attachment; but the court considered that if he did use it, it was but just that he should pay interest.[4] And the same rule was laid down by the Supreme Court of the United States.[5]

In Maine, the garnishee is entitled to the benefit of the presumption that he was ready to pay, and had reserved and was holding the money unemployed to await the decision of the cause; but where the facts rebut such presumption, he is chargeable with interest.[6]

In Massachusetts, the presumption is that the garnishee is prevented by law from paying the debt, or using the money; and

[1] Fitzgerald *v.* Caldwell, 2 Dallas, 215; Willing *v.* Consequa, Peters C. C. 301; Stevens *v.* Gwathmey, 9 Missouri, 628; Cohen *v.* St. Louis Perpetual Ins. Co., 11 Ibid. 374; Little *v.* Owen, 32 Georgia, 20; Clark *v.* Powell, 17 Louisiana Annual, 177.

[2] Mackey *v.* Hodgson, 9 Penn. State, 468.

[3] Fitzgerald *v.* Caldwell, 2 Dallas, 215; 1 Yeates, 274; Updegraff *v.* Spring, 11 Sergeant & Rawle, 188; Mackey *v.* Hodgson, 9 Penn. State, 468; Irwin *v.* Pittsburgh & C. R. R. Co., 43 Ibid. 488; Jackson's Ex'r *v.* Lloyd, 44 Ibid. 82; Allegheny Savings Bank *v.* Meyer, 59 Ibid. 361; Rushton *v.* Rowe, 64 Ibid. 63; Jones *v.* Man. Nat. Bk., 99 Ibid. 317.

[4] Willing *v.* Consequa, Peters C. C. 301.

[5] Mattingly *v.* Boyd, 20 Howard Sup. Ct. 128.

[6] Norris *v.* Hall, 18 Maine, 332; Blodgett *v.* Gardiner, 45 Ibid. 542.

if the fact be that he does not use it, he will not be chargeable with interest. But if this locking up of the fund is merely a fiction, the garnishee in truth making use of it all the time the matter is in suspense, he will be liable for interest. A figure used by the court, in a case involving this question, has much illustrative force. "The service of the writ turned the key upon the fund, but the trustee keeps the key, unlocks the chest, and takes the money in his own hands. In such case, he cannot be allowed to say, 'the fund was locked up, and therefore I will pay nothing for the use of it.' This is the reason of the thing, and there is no authority against it."[1]

In Vermont, it was decided that if the debt of the garnishee was, by operation of law, bearing interest at the time of the garnishment, the garnishee should be held liable to pay it.[2]

In Connecticut, if the garnishee mingles the defendant's money with his own, and treats it as such, and does not so keep it that he can pay it over to the rightful owner when called on for that purpose, but uses it indiscriminately with his own, he is chargeable with interest.[3]

In Maryland, if the garnishee assumes the position of a litigant, he is chargeable with interest.[4]

In Virginia, if he keep the defendant's money in his hands during the pendency of the attachment, he is presumed to use it, and will be charged with interest. To avoid this, he must pay the money into court.[5]

In Georgia, the presumption is that the garnishment stays the property in the hands of the garnishee, and the law considers it to remain *in statu quo*, until ordered to be paid out by the judgment of the court. But if the fact be that the fund never was set apart or deposited, but continued mixed with the rest of the garnishee's business capital, he will be charged with interest. And it is there considered, that a resistance of the attachment by the garnishee will entitle the plaintiff to recover interest against him.[6] And it is there held that tendering the money into court does not stop interest against the garnishee, but, to stop interest, he must pay it into the court.[7]

In Mississippi, the rule is, that if a garnishee wishes to avoid

[1] Adams *v.* Cordis, 8 Pick. 260.

[2] Baker *v.* Railroad Co., 56 Vermont, 302.

[3] Woodruff *v.* Bacon, 35 Conn. 97. See Candee *v.* Skinner, 40 Ibid. 464.

[4] Chase *v.* Manhardt, 1 Bland, 333.

[5] Tazewell *v.* Barrett, 4 Hening & Munford, 259; Ross *v.* Austin, Ibid. 502; Templeman *v.* Fauntleroy, 3 Randolph, 434.

[6] Georgia Ins. and Trust Co. *v.* Oliver, 1 Georgia, 38.

[7] Long *v.* Johnson, 74 Georgia, 4.

paying interest *pendente lite* on his debt to the defendant, he can do so by paying the money into court; and, if he does not do that, it is proper that the continued payment of interest should fall on him, rather than its loss should be suffered by the creditor.[1]

In Missouri, the garnishee's denial of indebtedness to the defendant fully rebuts any presumption that he had had the money lying idle by him, ready to pay the plaintiff's demand when judgment should be obtained.[2]

In Ohio, nothing short of proof that the garnishee actually held the money in readiness to be disposed of as directed by the court, will prevent his being charged with interest.[3]

In Iowa, the garnishee is presumed to have kept the money as a separate fund; but this presumption may be overcome, by his assuming the attitude of a litigant, or by evidence showing that he did not keep it as a separate fund; and if overcome, he is chargeable with interest.[4]

The deductions from the decisions thus cited may be thus recapitulated: 1 The presumption is, generally, that the garnishee keeps the money by him, set apart for the payment of the attachment. 2. This presumption may be rebutted, either by the course of the garnishee in assuming the position of a litigant, or by any competent evidence: while in Virginia and Mississippi, the garnishee can avoid liability for interest only by paying the money into court; and in Massachusetts, must make it appear that he has not used the money. The course of decision, therefore, is clearly adverse to exempting a garnishee from this liability; and the probability is that eventually the rule as laid down in Massachusetts will be generally acquiesced in.

§ 666. The foregoing considerations apply only to the case of the garnishee's liability to a judgment in favor of the plaintiff in attachment, for interest accrued *pendente lite*. There is, however, another question which may be considered as growing out of this, and properly noticeable here. Where the debt due from the garnishee to the defendant is not wholly consumed in meeting the attachment, and the garnishee is accountable to the defendant for a balance, after satisfying the attachment, what rule shall govern the recovery of interest by the defendant in a suit against him who was garnishee? Shall the latter be exempted from paying any

[1] Work *v.* Glaskins, 33 Mississippi, 539; Smith *v.* German Bank, 60 Ibid. 69.

[2] Stevens *v.* Gwathmey, 9 Missouri, 636.

[3] Candee *v.* Webster, 9 Ohio State, 452.

[4] Moore *v.* Lowrey, 25 Iowa, 336.

interest on any part of his debt during the pendency of the attachment? or shall the exemption extend only to such part of the debt as it was necessary for him to retain to satisfy the attachment? The latter rule has been declared in Pennsylvania, where the court said: "It would be most unreasonable, when the debt claimed is a large one, and the debt for which the attachment issued is a small one, that interest should be suspended, during the pendency of the action, on the whole sum. If the debt was ten thousand dollars, and one hundred only were attached in the hands of the debtor, it would shock our understanding,— all mankind would cry out against the law, — if it pronounced that the creditor should lose the interest on his ten thousand dollars, to meet the debt of one hundred dollars."[1]

§ 667. The garnishee's liability, considered with reference to the time of the garnishment, cannot, without the aid of special statutory provision, be extended beyond the defendant's effects or credits in his hands *at the date of the garnishment.* The attachment is the creature of the law, and can produce no effect which the law does not authorize. Its operation, when served, is upon the attachable interests *then* in the garnishee's possession; and it cannot be brought to bear upon any liability of the garnishee to the defendant accruing *after* its service, unless the law so declare. And if such liability at the time of the garnishment be dependent on the happening of a contingency, which does happen afterwards, so as to create an absolute debt, yet the garnishee cannot be charged; for such was not the condition of things at the time of the garnishment.[2]

In Massachusetts it has been uniformly held, that the garnishee cannot be charged beyond the value of the effects in his hands, or the amount of debt due from him to the defendant, when he was summoned.[3] Therefore, where a lessee, bound by the terms of his lease to pay his rent quarterly, was summoned as garnishee of his lessor, it was decided that he could be charged only for so many quarters' rent as were due at the time of the garnishment, and not for anything falling due thereafter.[4] So,

[1] Sickman *v.* Lapsley, 13 Sergeant & Rawle, 224.

[2] Williams *v.* A. & K. Railroad Co., 36 Maine, 201; Norton *v.* Soule, 75 Ibid. 385; Hopson *v.* Dinan, 48 Michigan, 612.

[3] Wilcox *v.* Mills, 4 Mass. 218; Sanford *v.* Bliss, 12 Pick. 116; Meacham *v.* McCorbitt, 2 Metcalf, 352; Allen *v.* Hall, 5 Ibid. 263; Osborne *v.* Jordan, 3 Gray, 277; Hancock *v.* Colyer, 99 Mass. 187; Peterson *v.* Loring, 135 Ibid. 397; Capen *v.* Duggan, 136 Ibid. 501.

[4] Wood *v.* Partridge, 11 Mass. 488; Hadley *v.* Peabody, 13 Gray, 200; Brackett *v.* Blake, 7 Metcalf, 335.

where goods were delivered to one to be manufactured, and the contract was entire, and the job to be paid for when completed, and before its completion the owner was summoned as garnishee of the manufacturer; it was held, that the contract was an entire one, and that at the time of the garnishment there was nothing due to the latter, and that the garnishee was not chargeable.[1] So, where in an action arising from tort, verdict was rendered for the plaintiff on the 20th of April, but no judgment was entered therein until the following 8th of May, and in the mean time, on the 29th of April, the defendant was garnished; it was decided that, as the cause of action was for a tort, on account of which the garnishee could not be charged, and as the verdict did not convert it into a debt until judgment rendered on it, there was nothing owing by the garnishee when he was summoned.[2] So, in Virginia, where an agent of the defendant, employed to collect rents, was garnished, he was held not chargeable on account of any rents collected by him after the garnishment.[3] The same doctrine obtains in Maine. There, where a son gave a bond to his father for the payment of certain sums of money, and the delivery of certain quantities of provisions, at stated times in each year of his father's life, it was held, that he could not be charged as garnishee of his father for anything not actually payable when he was garnished.[4] In Alabama, Louisiana, California, Tennessee, Iowa, and Kansas, the same rule prevails.[5] In those States in which the law gives to garnishment the effect of charging the garnishee for attachable effects coming into his hands *after* he is summoned, the point of time up to which he can be held liable must be determined by the terms of the statute. In some States it is when his answer is filed; but in New Hampshire, where the statute makes him chargeable for "money, goods, chattels, rights, or credits in his possession at the time of the service of the writ upon him, or *at any time after*," it is held, that he is chargeable for all that is due from him at the time the judgment against the defendant is made up.[6]

[1] Robinson *v.* Hall, 3 Metcalf, 301. See Daily *v.* Jordan, 2 Cushing, 390; Hennessey *v.* Farrell, 4 Ibid. 267; Warner *v.* Perkins, 8 Ibid. 518; Strauss *v.* Railroad Co., 7 West Virginia, 368.

[2] Thayer *v.* Southwick, 8 Gray, 229.

[3] Haffey *v.* Miller, 6 Grattan, 454.

[4] Sayward *v.* Drew, 6 Maine, 263. See Mace *v.* Heald, 36 Ibid. 136; Williams *v.* A. & K. Railroad Co., Ibid. 201; Tyler *v.* Winslow, 46 Ibid. 348.

[5] Branch Bank *v.* Poe, 1 Alabama, 396; Hazard *v.* Franklin, 2 Ibid. 349; Payne *v.* Mobile, 4 Ibid. 333; Roby *v.* Labuzan, 21 Ibid. 60; Bean *v.* Miss. Union Bank, 5 Robinson (La.), 333; Norris *v.* Burgoyne, 4 California, 409; Davenport *v.* Swan, 9 Humphreys, 186; Morris *v.* U. P. R. Co., 56 Iowa, 135; Phelps *v.* A. T. & S. F. R. Co., 28 Kansas, 165.

[6] Palmer *v.* Noyes, 45 New Hamp. 174;

§ 668. This position must be distinguished from the case of the garnishee's liability in respect of *debitum in præsenti solvendum in futuro.*[1] We have previously seen that such a debt may be reached by garnishment.[2] There, the debt exists at the time of the garnishment, but is payable afterward: in the cases now under consideration, the debt has no existence until after the garnishment.

§ 669. It should also be distinguished from the case of a liability existing but uncertain as to amount, at the time of the garnishment, but which afterward becomes, as to the amount, certain. There, the garnishment will attach, and the extent of the garnishee's liability will be determined by the subsequent ascertainment of the amount due. Such was a case where an insurance company was summoned as garnishee, in respect of an amount due the defendant for a loss of property insured by the company, which happened before but was not adjusted until after the garnishment; and the company was held liable.[3] Much more, in such a case, is the company liable, after the claim of the insured for a loss has been recognized and voted to be paid.[4] But where an insurance company was garnished, after a loss, but before notice or proof thereof, and the policy issued by it to the defendant bound it to pay any loss "within sixty days *after due notice and proof thereof;*" it was held, in Maine, that the company could not be charged, because at the time of the garnishment it was uncertain and contingent whether the company would ever become liable, according to the terms of the policy, to pay anything.[5]

§ 670. But while it is true that the garnishee's liability cannot, in the absence of statutory authority, be extended beyond the effects in his hands at the time of the garnishment, it does not necessarily follow that he must be charged to that extent, without regard to what may have occurred between the time of the garnishment and that of the judgment against him. There are various modes in which the amount for which he is to be charged

changing the rule previously laid down in Smith *v.* B. C. & M. Railroad, 33 New Hamp. 337, that the garnishee's liability was to be determined by the state of facts existing at the time his disclosure was made.

[1] Branch Bank *v.* Poe, 1 Alabama, 396.

[2] *Ante*, § 557.

[3] Franklin F. I. Co. *v.* West, 8 Watts & Sergeant, 350. See Nevins *v.* Rockingham M. F. I. Co., 5 Foster, 22; Knox *v.* Protection Ins. Co., 9 Conn. 430; Girard Fire Ins. Co. *v.* Field, 45 Penn. State, 129; 3 Grant, 329; Gove *v.* Varrell, 58 New Hamp. 78.

[4] Swamscot Machine Co. *v.* Partridge, 5 Foster, 369.

[5] Davis *v.* Davis, 49 Maine, 282; Nickerson *v.* Nickerson, 80 Ibid. 100.

may be affected and decided by events occurring after he was garnished. In the language of the Supreme Court of Massachusetts, "Some liability must exist at the time the process is served in order to charge him, but that liability may be greatly modified, and even discharged by subsequent events. Suppose one indebted to the principal is summoned as trustee, but he has various liens upon the fund, as, for instance, to indemnify himself against suretyships and liabilities for the principal. These liabilities may all be discharged, and thus leave the fund subject to the attachment; or they may be enforced, in whole or in part, and then the trustee will have a clear right to deduct from the fund the amount paid by him, in pursuance of liabilities which existed at the time of the service, and thus the fund may be diminished, or even wholly absorbed. A factor may have a large amount of goods of his principal, on which, however, he has a lien for his general balance. He may have received of his principal bills of exchange, which have gone forward, but of which the acceptance is uncertain. In this state he is summoned. He will not be chargeable for funds acquired after the service; but he may receive funds after the service, which will discharge and reverse the balance, and leave the fund liable to the trustee process; whereas, but for such acquisition of funds afterwards, the fund attached would be first liable to the factor's balance, which might thus absorb it. There are various modes, therefore, in which the question, whether trustee or not and for what amount, may be affected and decided by events occurring after the service of the process." The case to which these views were applied was this: A. sued B. by attachment, and summoned C. as garnishee, who was at the time indebted to B., but B. was also indebted to him. After he was garnished, C. sued B. and obtained judgment against him, and when A. obtained a judgment against C. as garnishee, C. paid over only the difference between the amount of his judgment against B. and that of A.'s judgment against him. The court held, that where one is chargeable as a debtor of the defendant the question will be whether he holds any balance, *upon a liquidation of all demands.* In striking such balance he has a right to set off from what he owes the defendant, any demand which he might set off in any of the modes allowed either by statute or common law, or in any course of proceeding. And as it appeared that the garnishee was entitled to the set-off in the case in hand, he was discharged.[1]

[1] Smith *v.* Stearns, 19 Pick. 20. See *post*, §§ 683–688.

§ 671. In New Hampshire,[1] and Vermont,[2] and in Pennsylvania[3] since 1836, the garnishee is chargeable not only for the effects in his hands when he was summoned, but also for whatever may come into his hands, or become due from him to the defendant, between the time of the garnishment and that of the answer. In each case, however, this results from peculiar statutory provisions. In Maryland, the practice is to condemn all property of the defendant in the hands of the garnishee at the time of trial.[4] And in New York, where garnishment, as it elsewhere exists, is not known, but where the service of the attachment upon a party having property of the defendant in his possession is, in effect, an attachment of the property, it was held, as between different attaching creditors, that an attachment served on the 6th of April, upon a factor having in his hands property of the defendant, and also bills of lading of goods consigned to him by the defendant, but not yet received, was a continuing attachment which was entitled to precedence of one served on the 15th of June after the reception by the factor of the goods specified in the bills of lading.[5]

[1] Edgerley *v.* Sanborn, 6 New Hamp. 397.

[2] Newell *v.* Ferris, 16 Vermont, 135; Spring *v.* Ayer, 23 Ibid. 516.

[3] Franklin F. I. Co. *v.* West, 8 Watts & Sergeant, 350; Silverwood *v.* Bellar, 8 Wharton, 420; Sheetz *v.* Hobensack, 20 Penn. State, 412.

[4] Glenn *v.* Boston & Sandwich Glass Co., 7 Maryland, 287.

[5] Patterson *v.* Perry, 5 Bosworth, 518; 10 Abbott Pract. 82.

CHAPTER XXXVI.

THE GARNISHEE'S RIGHT OF DEFENCE AGAINST HIS LIABILITY TO THE DEFENDANT.

§ 672. As the attaching creditor can hold the garnishee only to the extent of the defendant's claim against the garnishee, and can acquire no rights against the latter, except such as the defendant had; and as he is not permitted to place the garnishee in any worse condition than he would be in, if sued by the defendant; it follows necessarily, that whatever defence the garnishee could urge against an action by the defendant, for the debt in respect of which he is garnished, he may set up in bar of a judgment against him as garnishee.[1] Were it otherwise, an attaching creditor might obtain a recourse against the garnishee which the defendant could not; a proposition, the statement of which, except as to cases of fraud, is its own refutation. And while it is not the garnishee's right to assume the attitude of a litigant, as against the plaintiff's right to appropriate the property or credits in his hands to the satisfaction of the demand against the defendant, it is yet his duty, and one in which he will always be sustained by the court, to see that no judgment is rendered against him for more than he is legally liable for.[2] To that end his answer should be so framed as not to preclude his availing himself, at the trial, of any extraneous defence to which he would otherwise be entitled. If, when garnished, or afterwards, he was liable to be charged, but claims that his liability has been discharged, he should state all the facts, and submit the question of discharge to the court. If, assuming that he has been discharged, he file a general denial, he cannot at the trial make the special defence, which he could have made if he had disclosed it in his answer.[3]

[1] Strong's Ex'r *v.* Bass, 35 Penn. State, 333; Myers *v.* Baltzell, 37 Ibid. 491; Edson *v.* Sprout, 33 Vermont, 77; Firebaugh *v.* Stone, 36 Missouri, 111; McDermott *v.* Donegan, 44 Ibid. 85; Ellison *v.* Tuttle, 26 Texas, 283; Baker *v.* Eglin, 11 Oregon, 333; Schuler *v.* Israel, 120 U. S. 506; Sauer *v.* Nevadaville, 14 Colorado, 54.

[2] Pounds *v.* Hamner, 57 Alabama, 342.

[3] *Post*, § 682 *b*; Royer *v.* Fleming, 58 Missouri, 438; Ronan *v.* Dewas, 17 Missouri Appeal, 306.

§ 672 *a*. If in the contract between the defendant and the garnishee, through which it is sought to charge the latter, there be a stipulation giving him the right to avoid or discharge pecuniary liability by doing a certain act, and the act be done, the garnishee cannot be charged. Thus, it was sought to charge a fire insurance company, under a policy issued to the defendant, on property which was afterwards destroyed by fire, and the *quantum* of the defendant's loss was adjusted between him and the company at a given sum; but before the adjustment the company was summoned as garnishee of the defendant. The court held, that the company was chargeable as such, but for a provision in the policy giving it the option to repair or rebuild the building, "giving notice of their intention so to do, within thirty days after the preliminary proofs shall have been received at the office of the company." Within that time the company claimed the option, and gave notice thereof to the defendant; and the court ruled that this released the obligation to pay the defendant the amount of the loss.[1]

§ 672 *b*. In law, a judgment in favor of a defendant in any action is conclusive, as between him and the plaintiff, against his being indebted to the plaintiff on the grounds involved in that action. But when such a defendant is garnished in a suit against that plaintiff, is that judgment conclusive against his liability as garnishee for the same cause of action? In Maine, it was held, that this depended upon whether the suit was instituted before or after the garnishment. If before, then the judgment is conclusive against the garnishee's liability; if after, not so: for the attaching plaintiff could not be a party to the suit subsequently brought, and could not employ counsel or summon witnesses therein, or be heard in the final disposition thereof. All this he might do in his own suit; and the defendant therein, it was held, could not devest him of that existing right by bringing a suit against him who had previously been summoned as garnishee.[2] Somewhat similar to this case was one in Massachusetts, where the garnishee, when summoned, held certain property which had been put into his hands by the defendant, as security for his liability as surety for the defendant on a bail bond, given in a suit in which the defendant had been arrested. After the garnishment the garnishee surrendered the defendant, who thereupon took the poor debtor's oath; but the creditor insisted

[1] Hurst *v.* Howe P. F. Ins. Co., 81 Alabama, 174.

[2] Webster *v.* Adams, 58 Maine, 317.

that the proceedings were irregular, and brought an action against the garnishee on the bail bond. It was held, that the question of the garnishee's liability on the bail bond might be inquired into and passed upon in the garnishment proceeding, notwithstanding the pendency of the suit against him on the bond.[1]

§ 673. The foundation of all proceedings against garnishees is, that the plaintiff shall have an unsatisfied claim against the defendant. Whenever his claim is satisfied, he can no more subject a garnishee to liability, than he can levy on property. It is, therefore, entirely competent for the garnishee, in order to prevent a judgment against him, to show that whatever claim the plaintiff may have had against the defendant has been satisfied; and if necessary, he may file a bill of discovery against the plaintiff to establish the fact.[2]

§ 674. It is an invariable rule, that no understanding or agreement entered into between the garnishee and the defendant *after* the garnishment, can have any effect upon the rights of the attaching creditor, based on the relations existing between the garnishee and the defendant when the garnishment took place.[3]

§ 674 *a*. It is an equally invariable rule, that no voluntary payment by the garnishee of his debt to the defendant, after the garnishment, and with knowledge on his part of its existence, will prevent his being charged as garnishee.[4] But where, as in some States may be done, the garnishment process is served by leaving a copy at the garnishee's abode, in his absence, if the garnishee, not knowing of that service, pay his debt to the defendant, it

[1] Hooton *v.* Gamage, 11 Allen, 354.

[2] *Ante*, § 663; Hinkle *v.* Currin, 1 Humphreys, 74; Baldwin *v.* Morrill, 8 Ibid. 132; Spring *v.* Ayer, 23 Vermont, 516; Thompson *v.* Wallace, 3 Alabama, 132; Price *v.* Higgins, 1 Littell, 274; Gleason *v.* Gage, 2 Allen, 410; Riddle *v.* Etting, 32 Penn. State, 412; Howard *v.* Crawford, 21 Texas, 399; Chanute *v.* Martin, 25 Illinois, 63.

[3] Ellis *v.* Goodnow, 40 Vermont, 287; Leslie *v.* Merrill, 58 Alabama, 322; Archer *v.* People's Sav. Bk., 88 Alabama, 249.

[4] Locke *v.* Tippets, 7 Mass. 149; West *v.* Platt, 116 Ibid. 308; Johnson *v.* Carry, 2 California, 33; Home Mutual Ins. Co. *v.* Gamble, 14 Missouri, 407; Pulliam *v.* Aler, 15 Grattan, 54; Wilder *v.* Weatherhead, 32 Vermont, 765; Sargent *v.* Wood, 51 Ibid. 597; Cleneay *v.* Junction R. R. Co., 26 Indiana, 375: Toledo W. & W. R. R. Co. *v.* McNulty, 34 Ibid. 531; Hughes *v.* Monty, 24 Iowa, 499; Parker *v.* Parker, 2 Hill Ch'y, 35; Johann *v.* Rufener, 32 Wisconsin, 195; Mason *v.* Crabtree, 71 Alabama, 479; Donnell *v.* Portland & O. R. Co., 76 Maine, 33.

will discharge his liability.[1] And a payment by the garnishee's agent, after the garnishment, but in ignorance of it, will have the same effect;[2] but not if the agent knew of the garnishment.[3]

Any payment made by a garnishee to the defendant, after garnishment, is voluntary, unless made under the compulsion of judicial order or process. And where such order or process is relied on as authorizing such payment, it is necessary that the jurisdiction and power of the court to make and enforce it should appear; and, also, that the garnishee could not have avoided compliance therewith. Thus, where A. in Alabama consigned certain iron to B. in New Orleans, who caused the same to be stored; and thereafter B. failed and became insolvent, and a syndic was appointed under the laws of Louisiana to receive his assets for the benefit of his creditors; and the syndic claimed a lien on the iron for the price of the storage thereof; and A. was unable to obtain the iron, except on payment of the claim for storage, for which a lien on the iron existed; and on the presentation of these facts to a court in New Orleans, an order was made thereby for the payment into court of the amount claimed for storage, subject to such order as the court might make as to the disposal of said money; and under that order A. paid the money into that court, after garnishment in a court in Alabama; it was held, that the payment so made was no defence to A. against liability in Alabama as garnishee of B.; because, first, it did not appear what, by the law of Louisiana, were the powers and duties of the syndic, or of the court which made the order; secondly, that B., though in possession of the iron, with a lien on it for the storage, could still have maintained *indebitatus assumpsit* against A. for the storage; and thirdly, that A. could have forced the surrender of the iron, by suit, without repaying the charges upon it to either B. or the syndic.[4] And so, it was held in Alabama, that a payment by a garnishee of his debt to the defendant, under an execution against him in the defendant's favor, when he could have had the execution stayed, by an application to the chancellor, until the termination of the garnishment proceeding, and made no such application, was a voluntary payment, which was no defence against his liability as garnishee.[5]

[1] Robinson *v.* Hall, 3 Metcalf, 301; Thorne *v.* Matthews, 5 Cushing, 544; Williams *v.* Marston, 3 Pick. 65.

[2] Spooner *v.* Rowland, 4 Allen, 485; Williams *v.* Kenney, 98 Mass. 142; Jordan *v.* Jordan, 75 Maine, 100; Landry *v.* Chayret, 58 New Hamp. 89.

[3] Conley *v.* Chilcote, 25 Ohio State, 320.

[4] Mobile & Ohio R. R. Co. *v.* Whitney, 39 Alabama, 468.

[5] Calhoun *v.* Whittle, 56 Alabama, 138.

§ 674 *b*. The time at which a payment by a garnishee to a defendant was made, may become material in reference to his liability under a garnishment made on the same day and about the same time. If the garnishee set up such a payment, it is for him to show that it was made prior to the garnishment, for he is cognizant of both facts, and better than any one else can show their relative positions. He is not entitled to a presumption in his favor. On the contrary, the presumption will be against him, if he fails to show the true state of the facts. Thus, where the return of the officer showed the garnishment of a corporation at half-past six o'clock in the forenoon, and the garnishee set up a payment made on the same day, without any evidence of the particular time, the garnishment was held to have been prior to the payment.[1]

§ 674 *c*. If a garnishee assume to determine that the garnishment proceeding is defective, and therefore not binding on him, and thereupon pay his debt to the defendant, and his judgment on that point be held erroneous, the payment will not prevent his being charged. Thus, one was garnished under a writ against Richard Johnson, whose real name was Richard H. Johnsen. After the garnishment the garnishee paid to the defendant the debt he owed him, and set up that payment in discharge of his liability, because of the misnomer in the writ; but the defence was overruled, and the garnishee charged.[2] The rule applied in that case is not capable of general enforcement: Thus, in Massachusetts, a Savings Bank was summoned as garnishee of Sarah Sisson, and answered that there was not any person of that name who was a depositor in the bank or to whom the bank was indebted. To further interrogatories the bank answered that, when it was summoned, a person by the name of Sarah F. Sisson was a depositor in the bank, having a credit of $53.19; and that that account was withdrawn by her after the garnishment. The court, holding the names to be different ones, discharged the garnishee; and said: "The only writ served upon the trustee was against Sarah Sisson. The trustee, having no funds belonging to any person of that name, and acting so far as appears *in good faith, and with no notice or knowledge that the person intended to be sued was Sarah F. Sisson*, lawfully paid over to the latter the funds in its hands belonging to her, and cannot by the subse-

[1] Harris *v.* Somerset & K. R. R. Co., 47 Maine, 298.

[2] Paul *v.* Johnson, 9 Philadelphia, 32.

quent amendment of the writ be made liable to pay the same over again to the plaintiff."[1]

§ 674 *d*. Every alleged payment must be a payment in fact, not a contrivance intended to be a payment or not, as circumstances might subsequently require. Therefore, where a person, being told that he was going to be summoned as garnishee of another, gave the other a check on a bank, and was afterwards garnished; and stated in his answer that he did not know that the check had ever been presented to the bank; and that, by an understanding between him and the defendant, it was placed in the hands of a clerk in the garnishee's store; it was held, that the garnishee might at pleasure revoke the check, and that the giving of it was no payment; and he was charged.[2]

§ 674 *e*. If the garnishee's liability to the defendant be one in which another is jointly bound with him, and his co-obligor, not being garnished, pay the debt, such payment is a discharge of the garnishee.[3]

§ 674 *f*. If a garnishee be discharged, and before the plaintiff sues out a writ of error to the judgment discharging him, he pay his debt to the defendant, on a judgment which the latter had

[1] Terry *v.* Sisson, 125 Mass. 560.

[2] Dennie *v.* Hart, 2 Pick. 204. In Barnard *v.* Graves, 16 Pick. 41, the town of Worcester was summoned as garnishee of A., and answered, showing that defendant was employed by the town; that on a certain day a settlement of accounts was had between A. and the town, when the selectmen gave him a check on a bank for $210; that there being, however, a debt due from him to the town, the amount of which was not then ascertained, it was agreed that the amount of the debt, when ascertained, should be deducted from the sum to be obtained by the check; that this debt was afterwards found to amount to $67.58; that the defendant being also indebted to one B. in the sum of $19.77, it was further agreed by the selectmen and the defendant, that the check should be placed in B.'s hands, and the amount thereof paid to him by the bank, in order that he might retain the sums due from the defendant to the town and to himself; and the check was accordingly received by B., and was in his hands at the time of the garnishment. The above case of Dennie *v.* Hart was relied on as establishing that the giving of the check was no payment by the town; but the court said: "In the case of Dennie *v.* Hart, the court considered the transaction merely colorable; that the depositary of the check was the agent of the trustee himself; and that the trustee had the control of it, and might revoke it when he pleased; and the decision went on that ground. In the present case, we think the depositary was not the agent of the town, but of A., to receive and appropriate the amount of the check, and that the town could not control or revoke it. The check, therefore, was a payment of the debt due from the town to A." See Getchell *v.* Chase, 124 Mass. 366.

[3] Jewett *v.* Bacon, 6 Mass. 60; Nash *v.* Brophy, 13 Metcalf, 476.

recovered against him, it will discharge his liability, though the judgment discharging him be afterwards reversed.[1] But where the attachment plaintiff, at the time the order of discharge was made, prayed an appeal therefrom, and within a few hours perfected the appeal, and caused official notice of the fact to be given to the garnishee; it was held, that a payment made by the garnishee of his debt to the defendant, in the interval between the discharge and the perfecting of the appeal, and without actual notice of the plaintiff's intention to appeal, did not discharge the garnishee from the attachment. The court said: "For all the purposes of the garnishment, the garnishee was a party to the action, and was bound to take notice of all that was done in court in relation to the attached fund, or in any way affecting him as garnishee, and must therefore be taken to have had constructive notice that an appeal had been prayed and granted."[2]

§ 675. While a voluntary payment, after garnishment, will not discharge the garnishee's liability, a payment under a previous garnishment will have all the force and effect of a payment prior to the institution of the suit in which it is sought to charge him; for the operation of the previous garnishment began at the time it was made, and the subsequent payment was only the consummation of a right existing at the time of the second garnishment.[3]

Thus, where one was summoned as garnishee in New Hampshire, and afterwards, on the same day, was summoned in Massachusetts; it was held, that the court in the former State had first acquired jurisdiction of the fund, and having, after a full disclosure by the garnishee of the facts relating to the suit in the latter State, rendered judgment and execution against him, which he had paid, that payment discharged his liability to the Massachusetts court.[4] And where an incorporated company, owner of a coasting vessel, was summoned in Massachusetts as garnishee of one of the seamen of the vessel; and the seaman *afterwards* brought suit in a court of admiralty in New York for the wages due him; in which suit the company appeared, and set up in defence that it had been garnished in Massachusetts; and the admiralty court held that the seaman's wages were not attachable, but were exempt from attachment; and rendered judgment against the owner, for all wages due him; from which

[1] Webb *v.* Miller, 24 Mississippi, 638.
[2] Puff *v.* Huchter, 78 Kentucky, 146.
[3] New Orleans M. & C. R. R. Co. *v.* Long, 50 Alabama, 498.
[4] Garity *v.* Gigie, 130 Mass. 184.

judgment no appeal could be taken; and the owner paid the amount of it; it was held by the Supreme Court of Massachusetts, that this payment discharged the owner from the attachment proceeding in that State.[1] But a payment made by a garnishee under an execution against him as such, will not avail, where, before payment, the debt he owed the defendant was set apart to the defendant as a portion of his legal exemption of personalty, and the garnishee was notified thereof before he made the payment.[2]

§ 676. Though a garnishee make payment after his garnishment, on execution obtained against him by the defendant, yet if such execution was irregular, and might have been set aside on his motion, it is held, in Missouri, to be no protection against the garnishment.[3]

§ 676 *a*. When a garnishee admits an indebtedness to the defendant, or that he has money of the defendant's in his hands, it is within the province of the court to order him to pay it into court, to be there held pending the litigation. He has no right to appeal from such an order;[4] and he will be protected by it against both the plaintiff and the defendant.[5]

§ 677. If one indebted pay his debt to a creditor of his creditor, without any authority from his creditor, and be afterwards garnished in a suit against the latter, this unauthorized payment will not avail him as a defence; and a ratification of it by the defendant after the garnishment will be ineffectual, because the *jus disponendi* in the defendant is taken away by the attachment.[6]

§ 678. If the debt of the garnishee to the defendant is barred by the statute of limitations, he may avail himself of the statute, just as he could if sued by the defendant.[7] And where an executor was summoned as garnishee of a legatee to whom the

[1] Eddy *v.* O'Hara, 132 Mass. 56.
[2] Watkins *v.* Cason, 46 Georgia, 444.
[3] Home Mutual Ins. Co. *v.* Gamble, 14 Missouri, 407.
[4] German Sav. B'k *v.* Peuser, 40 Louisiana Annual, 796.
[5] Rochereau *v.* Guidry, 24 Louisiana Annual, 294. See Ohio & M. R. W. Co. *v.* Alvey, 43 Indiana, 180.
[6] Sturtevant *v.* Robinson, 18 Pick. 175.
[7] Hinkle *v.* Currin, 2 Humphreys, 137; Benton *v.* Lindell, 10 Missouri, 557; Gee *v.* Cumming, 2 Haywood (N. C.), 398; Gee *v.* Warwick, Ibid. 354; Hazen *v.* Emerson, 9 Pick. 144; James *v.* Fellowes, 20 Louisiana Annual, 116.

testator had left a pecuniary legacy, and set up against the liability of the estate therefor a promissory note of the legatee, which was barred by the statute of limitations, the right of the attaching plaintiff to plead that statute was sustained.[1]

§ 679. If the consideration of the garnishee's debt to the defendant has failed, the garnishee may take advantage of it. Thus, where the garnishee had purchased a tract of land from the defendant, the last payment for which was due, but after the note therefor was given the garnishee discovered that there was a judgment against the defendant which bound the land, and which he was compelled to satisfy, and the amount was greater than that of the note; it was held that he could not be charged.[2]

§ 680. If a debtor, by the default of his creditor, be discharged from his contract, he cannot, in respect of that contract, be charged as garnishee of his creditor. Thus, where A. gave his note to B. for five tons of hay, deliverable in July, 1808, on A.'s farm, and B. was not there then to receive it; it was held, that B. had no cause of action against A., and that A. therefore could not be held as his garnishee.[3]

§ 681. Where a proceeding by foreign attachment in chancery is allowed, the garnishee may set up any equitable defence which shows that in equity he owes no debt to the defendant.[4] It was, therefore, held, in such a proceeding, that a garnishee with whom a horse was left by the defendant for keeping, was entitled, as against the attaching creditor, to have his claim for the keeping first satisfied out of the property.[5] And the Supreme Court of the United States ruled that, as a garnishee is only responsible for that which, both in law and equity, ought to have gone to pay the defendant, he can set up all the defences in the garnishment proceeding which he would have either in a court of law or a court of equity, if sued there by the defendant.[6]

§ 682. But any defence which the garnishee seeks to interpose against his liability must be such as would avail him in an

[1] Holt v. Libby, 80 Maine, 329.

[2] Sheldon v. Simonds, Wright, 724. See Mathis v. Clark, 2 Mills' Const. Ct. 456; Russell v. Hinton, 1 Murphey, 468; Moser v. Maberry, 7 Watts, 12; Ball v. Citizens' Nat. B'k., 39 Indiana, 364; Mowry v. Davenport, 6 Lea, 80.

[3] Jewett v. Bacon, 6 Mass. 60.

[4] Glassell v. Thomas, 3 Leigh, 113.

[5] Williamson v. Gayle, 7 Grattan, 152.

[6] Schuler v. Israel, 120 U. S. 506.

action by the defendant against him.[1] Extraneous matters having no relation to the question of his indebtedness to the defendant cannot be set up by him. It was, therefore, held, that he could not defeat the garnishment by showing that the judgment under which he was garnished did not belong to the plaintiff.[2] And so, a garnishee cannot retain from the effects in his hands anything to meet a contingent liability which he is under for the defendant. Thus, where the garnishee had held notes of the defendant for a debt, and caused them to be discounted by, and indorsed them to, a bank, and they were not yet due when the garnishment took place; it was held, that the garnishee had no claim against the defendant, and that his contingent liability as indorser of the notes was no defence to his being charged as garnishee; and the court refused to continue the cause until the maturity of the notes, in order to see whether they would be paid.[3]

§ 682 *a*. When, however, the garnishee sets up a defence against his liability to the defendant, it must not be such as would operate as a fraud upon the defendant's creditors. Thus, where an attorney-at-law was garnished, who had received from the defendant money, as security for several purposes; one of which was to secure such fees as might be due the attorney, in any business of the defendant which the attorney might have in hand for him, "either now or hereafter;" the court, while sustaining the garnishee's right to retain enough of the money to pay any fees due or to become due in any business in which he had been retained by the defendant before the garnishment; yet denied that right as to any business in which the retainer was subsequent to the garnishment, or as to business which arose afterward, in which the garnishee claimed fees merely by virtue of a prior general retainer. "It would," said the court, "be a fraud upon creditors to permit a debtor to place his property beyond their reach, by depositing it with an attorney, to be held nominally for future services to be rendered in whatever litigation the debtor might be engaged."[4]

§ 682 *b*. If a garnishee admit facts showing some liability, but rely on other facts as a defence against a recovery by the

[1] Jones *v.* Tracy, 75 Penn. State, 417.
[2] Jackson *v.* Shipman, 28 Alabama, 488.
[3] Smith *v.* B., C., & M. Railroad, 33 New Hamp. 337.
[4] Crain *v.* Gould, 46 Illinois, 293.

plaintiff, he cannot on the trial set up another and repugnant defence. His *allegata* and *probata* must agree.[1]

§ 682 *c*. The garnishee cannot escape liability, by showing that the defendant's money in his hands had been received by him through a transaction in violation of law. Thus, where the money in the garnishee's hands had been received from the sale of intoxicating liquors, made by him as agent of the defendant, which sale was unlawful; it was held, that this constituted no defence against the garnishee's liability.[2]

§ 683. The particular defence which has given rise to the greatest amount of adjudication, is *set-off;* concerning which the rule is well established, that the rights of the garnishee shall not be disturbed by the garnishment. Whatever claim, therefore, he has against the defendant, and of which he could avail himself by set-off in an action between them, will be equally available to him in the same way, in the garnishment proceeding.[3] And though the set-off consist of moneys paid by the garnishee, on his verbal *assumpsit* of debts of the defendant, which he might have avoided by pleading the statute of frauds, the plaintiff cannot object to it; for that plea is a personal privilege which may be waived, and having been waived by the garnishee, his payment cannot be assailed on that ground.[4]

§ 684. The claim which the garnishee seeks to set off against his indebtedness to the defendant must, however, be due in the same right as his indebtedness. Therefore, a garnishee answering that he is indebted to the defendant, cannot set off a claim

[1] First Baptist Church *v.* Hyde, 40 Illinois, 150.

[2] Thayer *v.* Partridge, 47 Vermont, 423.

[3] Picquet *v.* Swan, 4 Mason, 443; Ashby *v.* Watson, 9 Missouri, 236; Beach *v.* Viles, 2 Peters, 675; Mattingly *v.* Boyd, 20 Howard Sup. Ct. 128; Arledge *v.* White, 1 Head, 241; Rankin *v.* Simonds, 27 Illinois, 352; Sampson *v.* Hyde, 16 New Hamp. 492; Brown *v.* Warren, 43 Ibid. 430; Strong's Ex'r *v.* Bass, 35 Penn. State, 333; Nesbitt *v.* Campbell, 5 Nebraska, 429. In New Hampshire the rule on this subject was thus stated: "The principle is well settled, that the trustee may retain in his hands of the funds of the debtor, an amount equal to all sums of which said trustee might legally or equitably avail himself by way of set-off, by any of the modes allowed either by the common or statute law, if the action were brought by the defendant himself against the trustee. One of the common and material elementary principles applicable to the doctrine of set-off, is, that the claims between the parties should be mutual in their character, and should exist at the time of the commencement of the suit." Wheeler *v.* Emerson, 45 New Hamp. 526.

[4] McCoy *v.* Williams, 6 Illinois (1 Gilman), 584.

he has, as administrator of another person, against the defendant.[1] So, if he be indebted individually to the defendant, he cannot set off a debt due from the defendant to him and another jointly.[2] So, where several garnishees were indebted as copartners to the defendant, who was indebted to them individually as legatees, it was held, that the two debts could not be set off against each other.[3] But where a copartnership was indebted to the defendant, and a part only of the members of the firm were garnished, it was held, in Massachusetts, that those who were summoned should be allowed the benefit of such set-offs as they, and their copartners, not summoned, were entitled to against the defendant.[4] And where A. had in his hands a fund, out of which he and B. & C. were entitled to a certain amount, and the remainder was to go to D., and A. was summoned as garnishee of D.; it was held, that he might retain not only what was due to himself, but what was due to B. & C.[5] And where two persons were summoned as garnishees, who were indebted to the defendant jointly, it was held, that they might set off against their debt to him, not only a claim which they jointly had against him, but the several claim of each of them.[6]

§ 684 *a*. The claim upon which the garnishee relies as a set-off, must be one arising *ex contractu*. Therefore, where a town was garnished, and attempted to set off a tax due to it from the defendant against its indebtedness to him, the right was denied, upon the ground that the tax was in no sense a contract, express or implied.[7] So, where a garnishee sought to deduct from his debt to the defendant certain moneys which he had previously paid the defendant for intoxicating liquors sold by the defendant to him, in violation of law, and which he was authorized by statute to recover back "in an appropriate action;" it was held, that where a statute confers a remedy unknown to the common law, and prescribes a mode of enforcing it, that mode alone can be resorted to; that the right of the garnishee to reclaim the

[1] Thomas *v.* Hopper, 5 Alabama, 442; Woodward *v.* Tupper, 58 New Hamp. 577.

[2] Gray *v.* Badgett, 5 Arkansas, 16.

[3] Blanchard *v.* Cole, 8 Louisiana, 160; Wells *v.* Mace, 17 Vermont, 503. See Norcross *v.* Benton, 38 Penn. State, 217.

[4] Hathaway *v.* Russell, 16 Mass. 473.

[5] Manufacturers' Bank *v.* Osgood, 12 Maine, 117.

[6] Brown *v.* Warren, 43 New Hamp. 430.

[7] Johnson *v.* Howard, 41 Vermont, 122; Hibbard *v.* Clark, 56 New Hamp. 155. See Shaw *v.* Peckett, 26 Vermont, 482; Camden *v.* Allen, 2 Dutcher, 398; Pierce *v.* Boston, 3 Metcalf, 520; Perry *v.* Washburn, 20 California, 318; Mayhew *v.* Davis, 4 McLean, 213.

money he had illegally paid the defendant was not founded upon a contract, but arose solely from the violation of law; that it was given to the purchaser alone, to be enforced at his option, and could be enforced by him only in the specific mode pointed out in the statute itself; and that he could not enforce it by way of deduction from his debt to the defendant.[1]

§ 685. Whether the garnishee's right of set-off will be restricted to debts actually due and payable from the defendant to him at the date of the garnishment, has been differently decided. In Massachusetts, New Hampshire, Vermont, and Maryland, the rule is, that if the defendant *before final answer* becomes indebted to the garnishee, on any contract entered into before the garnishment, the garnishee's right of set-off exists.[2] Thus, where the garnishee, when summoned, was indebted to the defendant, but was, at the same time, liable as accommodation indorser of a note of the defendant for a larger amount, which became due after the garnishment, and was protested for non-payment, and the garnishee paid it before he made his answer: the court held, that he could set off the amount of the note against his debt to the defendant; and in giving their decision, observed: "Under these circumstances, we think he cannot be held as trustee; for it would be against justice that he should be held to pay a creditor of his debtor the only money by which he can partially indemnify himself. This question has not before arisen, but we think it quite consistent with the object and views of the legislature, and with the general tenor of the statute, that if before final answer the debtor becomes indebted to the respondent on any contract entered into before the service of the writ, the latter shall have a right of set-off, and be chargeable only with the final balance, if one should be due. This decision will not reach the case of a liability incurred after the service of a writ, or where the effect of such liability may be avoided by reasonable diligence on the part of the person liable, to procure the payment of the debt by the principal; nor where it is contingent whether the liability will ever be enforced or not; but we confine it to such a case as we have before us, in which there was an actual liability before the

[1] Thayer *v.* Partridge, 47 Vermont, 423.

[2] Boston Type Co. *v.* Mortimer, 7 Pick. 166; Allen *v.* Hall, 5 Metcalf, 263; Swamscot Machine Co. *v.* Partridge, 5 Foster, 369; Boardman *v.* Cushing, 12 New Hamp. 105; Boston & Maine Railroad *v.* Oliver, 32 Ibid. 172; Strong *v.* Mitchell, 19 Vermont, 644; Smith *v.* Stearns, 19 Pick. 20; Farmers & Merchants' Bank *v.* Franklin Bank, 31 Maryland, 404; Lannan *v.* Walter, 149 Mass. 14.

service of the writ, and an actual payment, by necessity, before the answer."[1]

§ 686. On the other hand, the garnishee cannot set off a note of the defendant which was not due at the time of the garnishment.[2] And where, before the garnishment, a judgment had been obtained against the garnishee, as security of the defendant, it was held to be no defence against the garnishee's liability,[3] even though after the garnishment he satisfied the judgment.[4] In Maine, the debt due the garnishee, and which he seeks to set off against his liability to the defendant, must have been a debt due at the time of the garnishment.[5] And so in Connecticut,[6] Alabama,[7] and Missouri.[8] In the Circuit Court of the United States for the Third Circuit, the following case occurred: A. was summoned on the 14th of September, as garnishee of B., and in his answer admitted having received, on the 19th of September, fifty crates of earthenware belonging to the defendant, which on being sold netted $900; but stated that he was indorser on bills accepted by B., which had been protested before the garnishment, and after the garnishment were paid by him. This case, it will be perceived, differs from that in Massachusetts, just cited, in the important point of the garnishee's liability as indorser having been fixed before the garnishment, though, as in that case, the payment was made afterward. WASHINGTON, J., charged the jury: "This is a hard case upon the garnishee, who, at the time this attachment was levied, was liable to pay these bills, as indorser, to a much greater amount than the value of the funds of the defendant in his hands, and if he had then paid them he most undoubtedly would not have had in his hands any effects of the defendant, as he could not have been liable for more than the balance of account between him and the defendant. But until he paid them, he was not a creditor of the defendant, and of course the attachment bound the effects of the defendant in his hands, at the time it was laid, which could not be affected by subsequent credits to which he might be entitled. The law of this State is too strong to be resisted. It not only declares, that the goods and effects of the absent debtor in the hands of the garnishee shall be bound by the attachment, but that the

[1] Boston Type Co. *v.* Mortimer, 7 Pick. 166.

[2] Edwards *v.* Delaplaine, 2 Harrington, 322; Manufacturers' Nat. B'k *v.* Jones, 2 Penn. Supreme Ct. 377.

[3] Field *v.* Watkins, 5 Arkansas, 672.

[4] Watkins *v.* Field, 6 Arkansas, 391.

[5] Ingalls *v.* Dennett, 6 Maine, 79.

[6] Parsons *v.* Root, 41 Conn. 161.

[7] Self *v.* Kirkland, 24 Alabama, 275.

[8] Clark *v.* Kinealy, 13 Missouri Appeal, 104.

garnishee shall plead that he had no goods and effects of the debtor in his hands when the attachment was levied, *nor at any time since;* on which the plaintiff is to take issue, and the jury are to find the fact put in issue, one way or the other. Now, until these bills were paid by the garnishee, he had no claim against the defendant; and on the 19th of September, he had goods of the defendant in his hands, which must decide the issue in favor of the plaintiff. The case must be decided precisely in the same manner as if this cause had come on before those bills were paid by the garnishee. Your verdict, therefore, must be for the plaintiff, to the amount of the effects acknowledged by the garnishee to have been in his hands, independent of those bills."[1]

The Supreme Court of Pennsylvania held the same general doctrine, and said: "A cross demand against the defendant in an attachment may be set off by the garnishee, as it may by a defendant in any other suit, but subject to the same rules and restrictions; and a defendant may not set off a demand acquired after the action was instituted. Nor may a plaintiff give evidence of a cause of action incomplete at the impetration of the writ. But set-off is in substance a cross-action; and a cross demand also must have been complete when the action was instituted. In this respect the parties stand on equal ground. *Neither is allowed to get the whip hand and souse the other in costs, by starting before he was ready.*"[2]

§ 687. It may not unfrequently become a question, whether the set-off claimed by the garnishee was acquired before or after the garnishment. In such case there is no presumption; but the garnishee, alleging the existence of the set-off before the garnishment, must support his allegation with proof.[3] If the set-off was acquired by the garnishee after the garnishment, it cannot avail him as against his liability to the defendant.[4]

§ 688. In regard to set-offs the Supreme Court of Massachusetts has always entertained an expansive and equitable view of the rights of garnishees. There, as we have seen,[5] if the defendant before final answer becomes indebted to the garnishee, on any

[1] Taylor *v.* Gardner, 2 Washington C. C. 488.

[2] Pennell *v.* Grubb, 13 Penn. State, 552; Roig *v.* Tim, 10 Ibid. 115.

[3] Pennell *v.* Grubb, 13 Penn. State, 552.

[4] Dyer *v.* McHenry, 13 Iowa, 527; Crain *v.* Gould, 46 Illinois, 293; Wheeler *v.* Emerson, 45 New Hamp. 526; Farmers' Bank *v.* Gettinger, 4 West Virginia, 305; Seamon *v.* Bank, Ibid. 339.

[5] *Ante*, § 685.

contract entered into before the garnishment, the garnishee's right of set-off exists. It is also held to be clearly the construction of the trustee process in that State, that where one is chargeable in consequence of being the debtor of the defendant, the question will be, whether he holds any balance *upon a liquidation of all demands.* In striking such balance he has a right to set off, from the debt which he acknowledges he owes the principal, any demand which he might set off in any of the modes allowed either by statute or common law, or in any course of proceeding.[1]

§ 688 *a.* While the garnishee's right of set-off is ordinarily unquestionable, he may sustain such a relation to the defendant, and to the moneys of the defendant in his hands, as to deprive him of that right. Thus, where a president of a corporation was also a banker, and became the depositary of the corporation's money, while he held a large amount of its over-due bonds; and, to avoid being charged as its garnishee, he attempted to set off some of those bonds against his liability as depositary; it was held, that "it would be a breach of the confidence reposed in him as depositary, as president, and as co-corporator, for him to take such an advantage of his position;" and he was charged as garnishee.[2]

§ 689. In Vermont[3] and Alabama, it has been held that a garnishee cannot avail himself of an equitable claim against the defendant by way of set-off. Therefore, where the garnishee had in his hands a sum of money belonging to the defendant, being a balance of the proceeds of property conveyed to him in trust to secure a debt due to him, but insisted upon his right to appropriate that balance to the payment of a note made by the defendant to S. & Co., and by S. & Co. transferred to the garnishee, but without indorsement, whereby only the equitable title to the note was vested in the garnishee, while the legal title still remained in S. & Co.; it was held by the Supreme Court of Alabama, that the garnishee, having only an equity, could not avail himself of it as a set-off.[4]

§ 689 *a.* The right of the garnishee to deduct from his liability to the defendant, is not confined to matters which come

[1] Smith *v.* Stearns, 19 Pick. 20. See Hathaway *v.* Russell, 16 Mass. 473; Green *v.* Nelson, 12 Metcalf, 567; Nickerson *v.* Chase, 122 Mass. 296.

[2] Fox *v.* Reed, 3 Grant, 81.

[3] Weller *v.* Weller, 18 Vermont, 55.

[4] Loftin *v.* Shackleford, 17 Alabama, 455; Self *v.* Kirkland, 24 Ibid. 275.

under the technical designation of set-off. Any damages which he may show himself entitled to recover of the defendant, and which arise out of the same transaction or contract in respect to which the plaintiff seeks to make the garnishee liable, may be so deducted. The garnishment cannot deprive him of the benefit of recoupment, or any like defence.[1] And this was so held, notwithstanding the existence of a statute which excepted from the privilege of deduction by a garnishee, by way of set-off, claims which he had for "unliquidated damages for wrongs or injuries." This was considered to refer to independent claims, and not to such as arise out of the contract under which the garnishee is liable to the defendant.[2] So, where A. agreed to do certain work for B. for a stipulated compensation, and B. furnished to A. materials to be used in the work; and B. was summoned as garnishee of A.; and it appeared that A., without B.'s knowledge or consent, had appropriated to his own use part of the materials so furnished, and had credited B. on his books with the value thereof; and B., on hearing of it, did not disavow the transaction; it was held, that A.'s act might be considered as ratified by B., so as to entitle him to set off the value of the materials against his debt to A.[3] So, where A. agreed to build a house for B., and in the contract stipulated to pay B. a certain penalty for every day that the completion of the house should be delayed beyond a day named; and before the house was completed he abandoned the work; and after its abandonment B. was summoned as garnishee of A., and in his answer admitted indebtedness to A., when the work was abandoned, but claimed to recoup against it the penalty stipulated for in the contract; the right to such recoupment was sustained.[4]

§ 690. We have considered only those cases in which the garnishee is *indebted* to the defendant. His position is different where it is sought to charge him in respect of property of the defendant in his hands. There his right of set-off will depend on the fact whether he has any lien legal or equitable, upon the property, or any right as against the defendant, by contract, by custom, or otherwise, to hold the property, or to retain possession of it in security of some debt or claim of his own. If he

[1] Powell *v.* Sammons, 31 Alabama, 552; Faxon *v.* Mansfield, 2 Mass. 147; Doyle *v.* Gray, 110 Ibid. 206; Hitchcock *v.* Lancto, 127 Ibid. 514; Rankin *v.* Simonds, 27 Illinois, 352; Gage *v.* Chesebro, 49 Wisconsin, 486.

[2] Cota *v.* Mishow, 62 Maine, 124.

[3] Brown *v.* Brown, 55 New Hamp. 74.

[4] Thompson *v.* Allison, 28 Louisiana Annual, 733.

has a mere naked possession of the property without any special property or lien; if the defendant is the owner, and has the present right of possession, so that he might lawfully take it out of the custody of the garnishee, or authorize another to do so; then the property is bound by the attachment in the hands of the garnishee, and he has no greater right to charge it with a debt of his own by way of set-off, than he would have had if the goods had been taken into custody by the officer, at the time of the attachment.[1]

[1] Allen v. Hall, 5 Metcalf, 263.

CHAPTER XXXVII.

THE GARNISHEE'S RELATION TO THE MAIN ACTION.

§ 691. WHEN one is, by garnishment, involuntarily made a party to a suit in which he has no personal interest, he should be in law fully protected by the proceedings against him. As has herein been often remarked, a garnishee is a mere stakeholder between the plaintiff and the defendant, having in his hands that which the law may take to pay the defendant's debt, in the event of a recovery by the plaintiff, or which he may, if no such recovery be had, be required to pay or deliver to the defendant. He stands in a position in which he cannot act voluntarily, without danger to his own interests.[1] If he voluntarily pay his debt to the defendant, after the garnishment, we have seen that such a payment will not protect him against a judgment in the attachment suit.[2] So, on the other hand, a voluntary payment to the plaintiff will not devest the defendant's right of action against him. Any payment he may make to the plaintiff, without the authority or consent of the defendant, will be regarded in law as voluntary, unless made under legal compulsion, in the manner prescribed by law. Hence there is a necessity, as well as great propriety, that the garnishee should be enabled to ascertain whether the proceeding against him, if carried to fruition, will constitute a protection to him against a second payment to the defendant.[3] This it will not do, if from any cause the judgment against the defendant be void.[4] The principles, therefore, connected with the garnishee's relation to the main action, will now receive attention.

§ 692. This subject presents itself primarily in two distinct aspects: 1. Where the defendant is personally served with process; and 2. Where the proceeding is *ex parte*, without any service of process on, or appearance by, the defendant, and where

[1] *Ante*, § 451 *b*.
[2] *Ante*, § 674 *a*.
[3] Douglas *v.* Neil, 37 Texas, 528.
[4] *Post*, § 696; Haynes *v.* Gates, 2 Head, 598.

jurisdiction is acquired over him through an attachment of his property.

In the first case, the jurisdiction obtains through the service of the process on the defendant: the attachment is not the foundation of the jurisdiction, but a provisional remedy allowed to the plaintiff for the purpose of securing his demand.

In the second case, the attachment is the basis of the jurisdiction. If it be issued without legal authority, any proceedings under it are *coram non judice* and void.

In the former case, though the attachment were illegally issued, yet it is the privilege of the defendant alone to take advantage of it, and if he waive the illegality, and the effects in the garnishee's hands are subjected to the payment of his debt, the defendant is concluded by the judgment of the court, and cannot afterwards question its sufficiency to protect the garnishee.[1]

Where, however, the defendant is not personally a party to the proceeding, it is different. In such case he has a right afterwards to know that his property has been taken conformably to law; and if it be not so taken, his interest in it is not devested. If taken by a court of competent jurisdiction, upon a legal case presented for the exercise of its jurisdiction, though the proceedings be irregular, and therefore voidable, they will be conclusive upon him until reversed, and any rights of property acquired through them will be sustained. But if the court have no jurisdiction of the subject-matter, or if jurisdiction be exercised without any legal foundation being laid for it, the whole proceeding is void, and the defendant's property is not alienated through it. His rights exist, to every intent, as if the proceeding had never taken place.[2]

§ 693. From these general propositions the following conclusions are drawn: 1. Where the defendant is personally before the court, the garnishee is not interested either in the jurisdictional legality of the proceedings, or in their practical regularity *as against the defendant;* and 2. Where the defendant is not personally before the court, the garnishee is concerned only in the question of jurisdiction; for if that has attached, and the judgment of the court will be conclusive as to the rights of property acquired through the attachment, he will be fully protected by a payment made by him while the proceedings stand in force.

[1] Featherston *v.* Compton, 3 Louisiana Annual, 380; Washburn *v.* N. Y. & V. M. Co., 41 Vermont, 50; Baltimore, O., & C. R. R. Co., *v.* Taylor, 81 Indiana, 24.

[2] *Ante* §§ 87 *a*, 87 *b*, 87 *c*, 88.

§ 694. But though, where the defendant is before the court in person, the garnishee is not concerned in the question of jurisdiction over him, yet he is directly interested in the question of jurisdiction over himself. The court may have power to hear and determine the main action, but none over the garnishee; in which case if the garnishee submit to the jurisdiction, and make payment under it, it will avail him nothing. Thus, if the law, as in Massachusetts, declare that no person shall be garnished in an action of replevin, or in an action on the case for malicious prosecution, or for slander, or in an action of trespass for assault and battery, and yet a garnishee be summoned in such an action, if he submit to the jurisdiction, it will be in his own wrong. But if the garnishee raise the question of jurisdiction, and it is decided against him, and the court proceeds to assert its jurisdiction by rendering judgment against him, a compulsory payment under that judgment will protect him against a subsequent action by the attachment defendant.[1]

§ 695. It follows hence, that a garnishee must, for his own protection, inquire, first, whether the court has jurisdiction of the defendant, and next, whether it has jurisdiction of himself. If the jurisdiction exists as to both, he has no concern as to the eventual protection which the judgment of the court will afford him; it will be complete.

If the court has jurisdiction of the defendant, and the garnishee wishes to question its right to proceed against himself, he must do so *in limine;* if he answer, and judgment be rendered against him, and he remove the case to a higher court, it was held in Alabama, that he cannot in that court object to the steps taken in the inferior court to charge him as garnishee.[2] And so, if he appear to the action, and submit to a rule to answer, and, by agreement entered of record, consent to a continuance of the cause, it is then too late for him to object to the process or its service.[3] But in Missouri it was held, that a corporation garnishee did not by appearing, answering, and *paying into court* the amount of its debt to the defendant, waive any objections to the jurisdiction which it might otherwise have interposed on account of insufficient service of the writ; and the court said, — "Whatever a garnishee may do respecting his own rights, he

[1] Wyatt's Adm'r *v.* Rambo, 29 Alabama, 510; Gunn *v.* Howell, 35 Ibid. 144. Reynolds *v.* Collins, 78 Ibid. 94. See National Bank *v.* Titsworth, 73 Illinois, 591.

[2] Gould *v.* Meyer, 36 Alabama, 565;

[3] Baltimore, O., & C. R. R. Co. *v.* Taylor, 81 Indiana, 24.

is powerless to do anything which will affect the rights of third persons; and if he is not legally served, nothing is attached in his hands." [1]

§ 696. Such are the principles which are considered to govern this subject. We will briefly present their operation, as exhibited in the reported cases. In Mississippi, the statute declared that "every attachment issued without bond and affidavit taken and returned, is illegal and void, and shall be dismissed." There, it was held, upon writ of error sued out by a garnishee, not only that a judgment against a garnishee, where such bond and affidavit had not been taken and returned, was erroneous, because the proceedings were illegal and void; [2] but that such a judgment was no bar to a subsequent action by the defendant against the garnishee. [3] In Indiana, a judgment rendered by a justice of the peace against an executor, as garnishee, was decided to be no protection to him, because the statute prohibited a justice of the peace from exercising jurisdiction in any action against an executor. [4] In Alabama, on error by the garnishee, a judgment against him was reversed, because the officer who issued the attachment had no jurisdictional right to issue it, and the attachment was therefore void. [5] In Tennessee, it was decided that a garnishee might plead in abatement that neither the plaintiff nor the defendant was a citizen of that State, in which state of case the court had no jurisdiction. [6] In Louisiana, it was held, that a garnishee might plead that the law under which the proceeding against the defendant was conducted had been repealed, and therefore that the court was without jurisdiction. [7] In Kentucky, a judgment against a garnishee in an attachment proceeding, instituted contrary to law, in a county not the defendant's residence, and in which he had not resided, was no protection to the garnishee. [8] In Missouri, it was held, in a garnishment proceeding under execution, that the garnishee might resist his liability on the ground that the judgment on which the execution was issued was void. [9] In Vermont, it was

[1] Gates v. Tusten, 89 Missouri, 13.

[2] Oldham v. Ledbetter, 1 Howard (Mi.), 43; Berry v. Anderson, 2 Ibid. 649; Ford v. Woodward, 2 Smedes & Marshall, 260.

[3] Ford v. Hurd, 4 Smedes & Marshall, 683.

[4] Harmon v. Birchard, 8 Blackford, 418.

[5] Dew v. Bank of Alabama, 9 Alabama, 323.

[6] Webb v. Lea, 6 Yerger, 473.

[7] Featherston v. Compton, 8 Louisiana Annual, 285.

[8] Robertson v. Roberts, 1 A. K. Marshall, 247.

[9] Smith v. McCutchen, 38 Missouri, 415; McCloon v. Beattie, 46 Ibid. 391; Simmons v. Missouri P. R. Co., 19 Missouri Appeal, 542.

held, that where there was no service of process upon the defendant (without which there could be no judgment lawfully rendered against him), the garnishee was entitled to move for the dismissal of the whole proceeding.[1] In Ohio, where the statute provides that an attachment shall not be granted on the ground of the non-residence of the defendant "for any claim other than a debt or demand arising upon contract, judgment, or decree;" in a suit based solely on a breach of duty, without averring that the duty arose by contract, it was held, that no jurisdiction of the non-resident defendants was acquired; that a garnishee therein was not bound to answer; and that no action could be maintained (under the law of that State authorizing such a proceeding) against the garnishee for refusing to answer.[2] The obvious principle upon which these and all similar cases stand is, that, as a judgment against a garnishee must be founded upon a valid judgment against the defendant, there can be no such foundation where the judgment against the defendant is unauthorized and void.[3]

In Maryland, it is the right of the garnishee, not only to contest, at any stage of the proceeding, the jurisdiction of the court over the defendant, because of the insufficiency of the affidavit,[4] but to dispute the truth of the ground upon which the attachment issued,[5] and even to take advantage of irregularities in the proceedings against the defendant.[6]

§ 697. When, however, the jurisdiction of the court over both the defendant and the garnishee has attached, the right of the latter to inquire into or interfere with the proceedings in the main action is at an end; for all that he is interested in is, that the proceedings against himself shall protect him against a second payment. That they will do so, though there be in them errors and irregularities for which the defendant might obtain their reversal, there can be no doubt.[7] It has, therefore, been

[1] Washburn *v.* N. Y. & V. M. Co., 41 Vermont, 50.

[2] Pope *v.* Hibernia Ins. Co., 24 Ohio State, 481.

[3] Pierce *v.* Carleton, 12 Illinois, 358; Atcheson *v.* Smith, 3 B. Monroe, 502; Whitehead *v.* Henderson, 4 Smedes & Marshall, 704; Matthews *v.* Sands, 29 Alabama, 136; Flash *v.* Paul, Ibid. 141; Desha *v.* Baker, 3 Arkansas, 509; Lovejoy *v.* Albree, 33 Maine, 414; Edrington *v.* Allsbrooks, 21 Texas, 186; Greene *v.* Tripp, 11 Rhode Island, 424; Matheney *v.* Earl, 75 Indiana, 531; Pierce *v.* Wade, 19 Bradwell, 185; Malloy *v.* Burtis, 124 Penn. State, 161.

[4] Shivers *v.* Wilson, 5 Harris & Johnson, 130; Yerby *v.* Lackland, 6 Ibid. 446; Bruce *v.* Cook, 6 Gill & Johnson, 345; Coward *v.* Dillinger, 56 Maryland, 59.

[5] Barr *v.* Perry, 3 Gill, 313.

[6] Stone *v.* Magruder, 10 Gill & Johnson, 333; Clarke *v.* Meixsell, 29 Maryland, 221.

[7] Atcheson *v.* Smith, 3 B. Monroe, 502; Lomerson *v.* Hoffman, 4 Zabriskie,

always held, that a garnishee cannot avoid or reverse a judgment against him, on account of mere irregularities in the proceedings in the main action. They affect only the defendant, who alone can take advantage of them.[1] Nor can he be entitled to be discharged because of a change of parties defendant in the main action.[2] Nor can he traverse the affidavit on which the attachment issued, where the defendant was served with process, and did not traverse it;[3] nor can he inquire into the merits of the cause, as between the plaintiff and the defendant;[4] nor is he required to make a defence on behalf of the defendant against the plaintiff's demand;[5] nor has he any right to do so;[6] nor, after judgment against the defendant, can he show that the plaintiff had no just demand against the defendant, or that the judgment ought to be altered or reversed.[7] Nor has he any such relation to the main action as will entitle him, after judgment has been rendered against him, to interfere in any arrangement between the plaintiff and defendant. He is not an assignee of the judgment against the defendant, nor has he any lien upon it; but in relation to it stands as an entire stranger.[8] But where the judgment against the defendant is invalid, the garnishee may, in any stage of the proceedings prior to judgment

674; Pierce *v.* Carleton, 12 Illinois, 358; Empire C. R. Co. *v.* Macey, 115 Ibid. 390; Houston *v.* Walcott, 1 Iowa, 86; Stebbins *v.* Fitch, 1 Stewart, 180; Parmer *v.* Ballard, 3 Stewart & Porter, 326; Thompson *v.* Allen, 4 Ibid. 184; Gunn *v.* Howell, 35 Alabama, 144; Pounds *v.* Hamner, 57 Ibid. 342; O'Connor *v.* O'Connor, 2 Grant, 245; Schoppenhast *v.* Bollman, 21 Indiana, 280; Ohio & M. R. W. Co. *v.* Alvey, 43 Ibid. 180.

[1] Stebbins *v.* Fitch, 1 Stewart, 180; Parmer *v.* Ballard, 3 Ibid. 326; Thompson *v.* Allen, 4 Stewart & Porter, 184; Smith *v.* Chapman, 6 Porter, 365; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Missouri, 421; Houston *v.* Walcott, 1 Iowa, 86; Matheny *v.* Galloway, 12 Smedes & Marshall, 475; Whitehead *v.* Henderson, 4 Ibid. 704; Erwin *v.* Heath, 50 Mississippi, 795; Benson *v.* Holloway, 59 Ibid. 358; Flash *v.* Paul, 29 Alabama, 141; Security Loan Ass'n *v.* Weems, 69 Ibid. 584; Edwards *v.* Levinshon, 80 Ibid. 447; Camberford *v.* Hall, 3 McCord, 345; Foster *v.* Jones, 1 Ibid. 116; Chambers *v.* McKee, 1 Hill (S. C.), 229; Lindau *v.* Arnold, 4 Strobhart, 290; Cornwell *v.* Hungate, 1 Indiana, 156; Baltimore, O., & C. R. R. Co. *v.* Taylor, 81 Ibid. 24; White *v.* Casey, 25 Texas, 552; Sun Mutual Ins. Co. *v.* Seeligson, 59 Ibid. 3; Cowan *v.* Lowry, 7 Lea, 620.

[2] Bethel *v.* Chipman, 57 Michigan, 379.

[3] Douglas *v.* Neil, 37 Texas, 528.

[4] Hanna *v.* Lauring, 10 Martin, 563; Kimball *v.* Plant, 14 Louisiana, 511; Frazier *v.* Willcox, 4 Robinson (La.), 517; Brode *v.* Firemen's Ins. Co., 8 Ibid. 244; Planters' and Merchants' Bank *v.* Andrews, 8 Porter, 404; Merchants' Bank *v.* Haiman, 80 Georgia, 624.

[5] Moore *v.* C., R. I., & P. R. Co., 43 Iowa, 385.

[6] Pounds *v.* Hamner, 57 Alabama, 342.

[7] Woodbridge *v.* Winthrop, 1 Root, 557; Heffernan *v.* Grymes, 2 Leigh, 512; Lee *v.* Palmer, 18 Louisiana, 405; Bank of Northern Liberties *v.* Munford, 3 Grant, 232; Hodges *v.* Graham, 25 Louisiana Annual, 365; Merchants' Bank *v.* Haiman, 80 Georgia, 624.

[8] Braynard *v.* Burpee, 27 Vermont, 616.

against himself, take advantage of that invalidity to prevent such judgment.[1] But he can make only such objections thereto, on the ground of its invalidity, as appear on the face of the record, — he cannot go outside of the record to demonstrate the invalidity by parol proof. It was so held in Mississippi, in a case where the garnishee answered, acknowledging indebtedness, but averring that the decree in plaintiff's favor was null and void, because there had been no service of process on the defendant. But the record showed that there had been service of process, and that the decree had been taken *pro confesso;* and the court said, "Such a recital as this in the judgment or decree of a domestic court of general jurisdiction cannot be contradicted or questioned in a collateral proceeding."[2]

§ 698. In Louisiana, however, a garnishee was allowed to show, as a reason why judgment should not be rendered against him, that, before judgment was rendered against the defendant, the defendant was dead. This was upon the ground that the attaching creditor would, in such case, if the garnishee should be charged, obtain a preference over other creditors of the deceased, not authorized by the laws of that State.[3]

[1] Thayer *v.* Tyler, 10 Gray, 164; Pratt *v.* Cunliff, 9 Allen, 90; Woodfolk, *v.* Whitworth, 5 Caldwell, 561; Erwin *v.* Heath, 50 Mississippi, 795.

[2] Sadler *v.* Prairie Lodge, 59 Mississippi, 572.

[3] Allard *v.* DeBrot, 15 Louisiana, 253.

CHAPTER XXXVIII.

WHERE ATTACHMENT IS A DEFENCE, AND THE MANNER OF PLEADING IT.

§ 699. THE operation of an attachment against a garnishee is compulsory. He has no choice but to pay, in obedience to the judgment of the court to whose jurisdiction he has been subjected; and the exercise of that jurisdiction effects a confiscation, for the plaintiff's benefit, of the debt due from the garnishee to the defendant. In this proceeding it is an invariable rule, that the garnishee shall not be prejudiced, or placed in any worse situation than he would have been in if he had not been subjected to garnishment; that is, if obliged, as garnishee, to pay to the plaintiff the debt he owed to the defendant, he shall not be compelled again to pay the same debt to the defendant. When, therefore, he is sued for that debt, either before or after he has been summoned as garnishee, he must be allowed to show that he has been, or is about to be, made liable to pay, or has paid, the debt, under an attachment against the defendant, in which he has been charged as garnishee. To what extent this defence will avail him, and how he may take advantage of it, will constitute the subject of the present chapter, and will be considered in reference, I. To the case of garnishment prior to or pending suit brought by the defendant; and, II. To the case of suit brought after judgment against the garnishee.

§ 700. I. *Where the Garnishment is prior to or pending Suit brought by Defendant.* In England, the doctrine has long been, that where one has been summoned as garnishee, and the defendant in the attachment, before judgment of condemnation of the debt, sues the garnishee for that debt, the latter may plead the attachment in abatement;[1] but not in bar, until judgment be recovered against him.[2] It is no case for an interpleader.[3]

[1] Brook v. Smith, 1 Salkeld, 280.
[2] Nathan v. Giles, 5 Taunton, 558.
[3] Evans v. Matlock, 8 Philadelphia, 271.

The courts in this country have generally taken the same view. The question early came up in New York, in a case where a citizen of Baltimore was summoned as garnishee at that place, and afterwards, on going to New York, was sued by the defendant in the attachment suit, and pleaded the attachment. It was agreed in the case, that if the court should consider the plea good, either in abatement or bar, the plaintiff should be nonsuited. KENT, C. J., after noticing the English decisions, said: "If we were to disallow a plea in abatement of the pending attachment, the defendant would be left without protection, and be obliged to pay the money twice: for we may reasonably presume, that if the priority of the attachment in Maryland be ascertained, the courts in that State would not suffer that proceeding to be defeated by the subsequent act of the defendant going abroad and subjecting himself to a suit and recovery here.

"The present case affords a fair opportunity for the settlement and application of a general rule on the subject. It is admitted by the case that the plaintiff owes a large debt to the attaching creditors; and that the defendant is a resident of Maryland. There is then no ground to presume any collusion between the defendant and the creditors who attached; and there is no pretence that the plaintiff was not timely notified of the pendency of the attachment, or that the attachment is not founded on a *bona fide* debt, equal at least in amount to the one due from the defendant. If the force and effect of a foreign attachment is, then, in any case to be admitted as a just defence, it would be difficult to find a sufficient reason for overruling a plea in abatement in the present case." [1]

The same views have been expressed by the Superior Court of New Hampshire,[2] by the Supreme Courts of Maine,[3] Pennsylvania,[4] South Carolina,[5] Michigan,[6] and Iowa,[7] by the Court of Appeals of Maryland,[8] by the Circuit Court of the United States for the Third Circuit,[9] and by the Supreme Court of the United States.[10]

[1] Embree *v.* Hanna, 5 Johnson, 101.

[2] Haselton *v.* Monroe, 18 New Hamp. 598.

[3] Ladd *v.* Jacobs, 64 Maine, 347.

[4] Fitzgerald *v.* Caldwell, 1 Yeates, 274; Irvine *v.* Lumbermen's Bank, 2 Watts & Sergeant, 190; Adams *v.* Avery, 2 Pittsburgh, 77.

[5] Mars *v.* Virginia H. I. Co., 17 South Carolina, 514.

[6] Near *v.* Mitchell, 23 Michigan, 382.

[7] Clise *v.* Freeborne, 27 Iowa, 280.

[8] Brown *v.* Somerville, 8 Maryland, 444.

[9] Cheongwo *v.* Jones, 3 Washington C. C. 359.

[10] Wallace *v.* McConnell, 13 Peters, 136; Mattingly *v.* Boyd, 20 Howard Sup. Ct. 128.

§ 701. In Massachusetts, the pendency of an attachment is no cause to abate the writ; for *non constat* that judgment will ever be rendered in the attachment suit; but it is a good ground for a continuance while the process is pending.[1]

This view has been adopted in Louisiana, in a case where the garnishee's answer disclosed the existence of a prior attachment, in another State, of his property, in a proceeding against him as garnishee of the same defendant. The cases are not precisely parallel, but the principle involved is the same. The court ordered a stay of further proceedings against the garnishee until the decision of the prior attachment.[2] In Vermont, the pending garnishment cannot be pleaded in abatement; but the court gives judgment against the garnishee in favor of his creditor, — the attachment defendant, — with stay of execution until the garnishee is released from the garnishment.[3]

The Supreme Court of Alabama once sustained a plea in abatement, which went to the writ;[4] but afterwards fell into the doctrine declared in Massachusetts, and sustained this position in the following language: "If it be admitted that a pending attachment may be pleaded in abatement, it by no means follows that it should be pleaded in abatement of the writ. In general, a plea in abatement gives a better writ, and in such a case the appropriate conclusion is, a prayer of judgment of the writ, and that it be quashed. But where matter can only be pleaded in abatement, and yet a better writ cannot be given, as the writ does not abate, the prayer of the plea is, 'whether the court will compel further answer.' There are many reasons why an attachment pending should not be pleaded in abatement of the writ. The entertainment of such pleas would lead to the most delicate and embarrassing questions of jurisdiction, and in the conflict an error committed by either court would lead to the injury of one of the parties litigant. Either the garnishee might be compelled to pay the debt twice, or the creditor might be injuriously affected. All these consequences are avoided by considering it as cause for suspending the action of the creditor, until the attachment against his debtor is determined, when it can be certainly known what the rights of the parties are. When, therefore, the fact of an attachment pending for the same debt is made known to the court where the creditor of the garnishee has brought suit, it will either suspend all proceedings

[1] Winthrop *v.* Carleton, 8 Mass. 456. Spicer *v.* Spicer, 23 Ibid. 678; Jones *v.* Wood, 30 Ibid. 268.

[2] Carroll *v.* McDonogh, 10 Martin, 609.

[3] Morton *v.* Webb, 7 Vermont, 123;

[4] Crawford *v.* Clute, 7 Alabama, 157.

until the attachment suit is determined, or render judgment with a stay of execution, which can be removed, or made perpetual, in whole or in part, as the exigency of the case may require. And as this course is equally safe, and productive of less delay, it would seem to be the most eligible."[1] The court also intimated that such a stay of execution would be directed after judgment, notwithstanding an omission, or an ineffectual attempt, to plead the matter in abatement.[2] In Indiana, it was considered very doubtful whether a pending attachment can be pleaded in abatement, and the court manifested a disposition to concur in the Alabama doctrine.[3] In California that doctrine was fully concurred in.[4] In Georgia, the pendency of an attachment is not pleadable in bar, but when pleaded will justify the court in so moulding the judgment as to stay execution for a sufficient amount of the debt to protect the garnishee against a double payment.[5] And the U. S. Circuit Court in New Hampshire held, that a plea in abatement, setting up a garnishment of the defendant in a State court, could not be pleaded in abatement, but that a continuance *ex comitate* should be granted, in order that the plaintiff in the State court might have an opportunity to make his attachment available.[6]

§ 702. In England, an attachment cannot be pleaded *puis darrein continuance;* because after action brought upon a debt, it cannot be attached under the custom of London.[7] The Supreme Court of Pennsylvania assigned, no doubt, the true reason why this rule obtained in England, that when once a suit has been instituted in the superior courts of Westminster, for the recovery of a debt or demand, though it have not been followed by a judgment, the inferior courts cannot, by issuing an attachment, prevent the plaintiff from proceeding.[8] In this country, the question turns altogether upon the point whether a debt in suit can be attached.[9] Wherever the affirmative of this question is held, it must follow, of necessity, that an attachment, pending the

[1] Crawford *v.* Slade, 9 Alabama, 887; Montgomery Gas Light Co. *v.* Merrick, 61 Ibid. 534. See Gallego *v.* Gallego, 2 Brockenbrough, 285.

[2] Crawford *v.* Clute, 7 Alabama, 157; Crawford *v.* Slade, 9 Ibid. 887. See Fitzgerald *v.* Caldwell, 4 Dallas, 251.

[3] Smith *v.* Blatchford, 2 Indiana, 184.

[4] McFadden *v.* O'Donnell, 18 California, 160; Pierson *v.* McCahill, 21 Ibid. 122; McKeon *v.* McDermott, 22 Ibid. 667.

[5] Shealy *v.* Toole, 56 Georgia, 210.

[6] Lynch *v.* Hartford F. I. Co., 17 Federal Reporter, 627.

[7] Priv. Lond. 272; 3 Leonard, 210; Palmer *v.* Hooks, 1 Ld. Raymond, 727; Savage's Case, 1 Salkeld, 291.

[8] McCarty *v.* Emlen, 2 Yeates, 190.

[9] See Chapter XXXII.

action, may be pleaded *puis darrein continuance*. In Alabama the point came up in a case where the action on the debt and the attachment were in the same court, and the plea was sustained.[1] But where the action and the attachment were in courts of different jurisdictions — the former in a District Court of the United States, and the latter in a State Court — it was decided by the Supreme Court of the United States that the plea was bad on demurrer; the court expressing the following views: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion, and the money recovered of the defendant, before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question. And if the defendant would have been protected *pro tanto*, under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle would support a plea in abatement of an attachment pending prior to the commencement of the present suit. The attachment of the debt, in such case, in the hands of the defendant, would fix it there, in favor of the attaching creditor, and the defendant could not afterwards pay it over to the plaintiff. The attaching creditor would, in such case, acquire a lien upon the debt binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, could not fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal; and where the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit; and the maxim, *qui prior est tempore, potior est jure*, must govern the case."[2]

§ 703. Manifestly, a pending attachment should have no effect upon an action by the creditor against his debtor, unless the attachment acts directly on the latter, and not intermediately through another. Therefore, where a town placed money in the

[1] Hitt *v.* Lacy, 3 Alabama, 104. See Herlow *v.* Orman, 3 New Mexico, 291.

[2] Wallace *v.* McConnell, 13 Peters, 136.

hands of its agent, to be paid to one who had been employed by the town, and before it was paid over, the agent was garnished in a suit against the party to whom the money was payable; which party afterwards brought suit against the town for the sum due him; it was held, that the garnishment of the agent was no defence.[1]

§ 703 *a*. Equally manifest is it that the pendency of an attachment is no defence to an action against the garnishee by an assignee of the defendant, to recover the debt in respect of which it is sought to charge the garnishee. Thus, where an indorsee of a negotiable promissory note sued the maker thereof, who pleaded a pending garnishment of himself in an action against the payee, it was held to be no defence.[2]

§ 703 *b*. As we have seen, a plaintiff may, by garnishment, attach a debt due from himself to the defendant;[3] but this will not authorize him to plead such garnishment, either in abatement or in bar of a suit by the defendant against him for that debt. Thus, a Rhode Island corporation sued B. and M., of New York, in the United States Circuit Court for New York; and B. and M. pleaded, that before that suit was instituted they had brought suit in the Supreme Court of New York against the corporation, and had therein attached the debt sued for by the corporation; whereby, under the law of New York, all sums of money owing by them to the plaintiff were held as security for the satisfaction of such judgment as they might recover against the corporation. Upon demurrer this plea was held bad, either in abatement or in bar; its essential vice being, that it sought to exclude the corporation from the benefit of a cross action, and to restrict it to a defence of the suit instituted by B. and M. against it. "We are," said the court, "referred to no case in which a defendant has been allowed to defeat an action at law against him by pleading the existence of a pending suit brought by himself against his adversary."[4]

§ 704. The question has arisen, whether the pendency of an attachment relieves the garnishee from accountability to the defendant, after the termination of the attachment suit, for interest on his debt during the pendency of that suit. In the

[1] Clark *v.* Great Barrington, 11 Pick. 260.

[2] Mason *v.* Noonan, 7 Wisconsin, 609.

[3] *Ante*, § 543.

[4] New England Screw Co. *v.* Bliven, 3 Blatchford, 240.

cognate question of the liability of the garnishee to have judgment rendered against him, as such, for interest on his debt, we have seen that if there is no contract on his part to pay interest thereon, he cannot be charged therewith.[1] The same rule was applied in Massachusetts to his liability to the defendant after the termination of the attachment suit. It was there held, that where interest accrues by way of damages for the non-payment of the debt, it cannot be recovered by the defendant from the garnishee for the period of time that the attachment suit was pending. In such case he is in no fault for not paying, and as he made no express agreement to pay interest, he ought not to be charged with it. But where the debt is one bearing interest, the interest is the debt as much as the principal, and he ought to pay it.[2]

In Pennsylvania, in cases where it does not appear that the debt bore interest, it was held to be clearly the general rule, that a garnishee is not liable for interest while he is restrained from the payment of his debt by the legal operation of an attachment; unless it should appear that there is fraud, or collusion, or unreasonable delay occasioned by the conduct of the garnishee.[3] It was, therefore, held, that an attachment might be pleaded in bar of interest on the debt, during the pendency of the attachment, although the garnishee had not paid anything under the attachment, and it had been discontinued.[4] This rule proceeds upon the presumption, that the garnishee, being liable to be called upon at any time to pay the money, has not used it. But where one attaches money in his own hands, no necessity exists for his holding it to answer the attachment, and consequently no presumption arises that he has not used it; and he will, therefore, be charged with interest during the pendency of the attachment.[5]

§ 704 *a*. In reference to the question of the garnishee's right to set up a garnishment as a defence against his liability to the defendant for interest on his debt during the pendency of the garnishment proceeding, it is of first importance that that proceeding should appear to have been a lawful one as against the garnishee; for if he was garnished under a void process, and after being discharged therefrom the attachment defendant sue him

[1] *Ante*, § 665.

[2] Oriental Bank *v.* Tremont Ins. Co., 4 Metcalf, 1; Bickford *v.* Rice, 105 Mass. 340; Huntress *v.* Burbank, 111 Ibid. 213.

[3] Fitzgerald *v.* Caldwell, 2 Dallas, 215; Weber *v.* Carter, 1 Philadelphia, 221.

[4] Updegraff *v.* Spring, 11 Sergeant & Rawle, 188.

[5] Willing *v.* Consequa, Peters C. C. 301.

on his debt, the garnishment will afford him no protection against the payment of interest during its pendency.[1]

§ 705. In pleading a pending attachment in abatement, the plea must contain averments of all the facts necessary to give jurisdiction to the court in which the attachment is pending, and must show whether the whole or what portion of the debt has been attached. A plea, therefore, setting forth that the defendant had been summoned as garnishee, under process issued on a judgment, but not stating the amount of the judgment, is bad on general demurrer.[2] In Ohio, it was held, that the previous garnishment of the defendant, in another State, and the making of an order by the court in the garnishment case, requiring the garnishee to pay into court the amount of his indebtedness, to satisfy the attaching creditor, was a good defence to an action in Ohio by the attachment defendant against the garnishee for the same debt, though the money had not been paid into the court having cognizance of the garnishment.[3] And where a judgment debtor is charged as garnishee, and pays the debt under execution against him as such, and afterwards the judgment creditor issues execution against him, he can apply to the court out of which this execution issued for an order to enter satisfaction of the judgment on which it is based. It is not a case for the interposition of a court of chancery.[4]

§ 706. II. *Where suit is brought after Judgment rendered against the Garnishee.* When, by a court having jurisdiction of the action and of the garnishee, judgment is rendered against him, and he has satisfied it in due course of law, such judgment is conclusive, against parties and privies, of all matters of right and title decided by the court, and constitutes a complete defence to any pending[5] or subsequent action by the defendant against the garnishee, for the amount which the latter was compelled to pay;[6] and this though the court be a foreign tribunal.[7]

[1] Hawkins *v.* Georgia Nat. Bank, 61 Georgia, 106.

[2] Crawford *v.* Clute, 7 Alabama, 157; Crawford *v.* Slade, 9 Ibid. 887; Clark *v.* Marbourg, 33 Kansas, 471.

[3] Baltimore & O. R. R. Co. *v.* May, 25 Ohio State, 347.

[4] Chandler *v.* Faulkner, 5 Alabama, 567.

[5] Cole *v.* Flitcraft, 47 Maryland, 312.

[6] *Post*, § 710; Killsa *v.* Lermond, 6 Maine, 116; Holmes *v.* Remsen, 4 Johnson Ch'y, 460; 20 Johnson, 229; Foster *v.* Jones, 15 Mass. 185; Hitt *v.* Lacy, 3 Alabama, 104; Mills *v.* Stewart, 12 Ibid. 90; Ross *v.* Pitts, 39 Ibid. 606; Moore *v.* Spackman, 12 Sergeant & Rawle, 287; Coates *v.* Roberts, 4 Rawle, 100; Anderson *v.* Young, 21 Penn. State, 443; Cheairs *v.* Slaten, 3 Humphreys, 101; Adams *v.* Filer, 7 Wisconsin, 306.

[7] Barrow *v.* West, 23 Pick. 270; Tay-

Of course, such a judgment cannot affect the rights of any one not a party or privy to it.[1] But while the law generally protects a garnishee in cases where it appears that he has once paid a judgment against him, it at the same time exacts the utmost good faith on his part, and requires the disclosure by him, in the garnishment proceedings, of all material facts within his knowledge affecting his liability, and the legal and equitable rights of other claimants of the funds in his hands; failing in which he may be subjected to a double payment of his debt to the defendant.[2]

§ 706 *a*. A judgment in favor of the garnishee is equally conclusive against the plaintiff, though obtained by means of fraud, and even perjury, committed by the garnishee. A case arose in New Hampshire, where, after the garnishee had answered and was discharged, the plaintiff brought an action on the case against him for obtaining his discharge by falsehood and fraud in his disclosure, averred in the declaration to have been "wholly false, fraudulent, wicked, wilful, and designed to defraud the plaintiff of his just claim against his debtor; by reason of which, the plaintiff was defrauded and prevented from recovering his debt against his debtor, and has wholly lost the same." There was a demurrer to the declaration, which was sustained, on the following grounds: "What is the foundation of the plaintiff's claim and charge? The substance of his complaint is, that the defendant had in his hands funds for which he ought to have been charged as trustee in that suit, and that by fraudulent contrivance with B. (the defendant in the attachment suit), and by falsehood and fraud in his disclosure, he obtained an unjust judgment for his discharge. The plaintiff, therefore, undertakes, as the foundation of his claim, to put in issue the precise point that was adjudged between the same parties in the former suit, to wit: whether the defendant had in his hands funds for

lor *v.* Phelps, 1 Harris & Gill, 492; Gunn *v.* Howell, 35 Alabama, 144; Cochran *v.* Fitch, 1 Sandford Ch'y, 142; Noble *v.* Thompson Oil Co., 69 Penn. State, 409; Morgan *v.* Neville, 74 Ibid. 52; Bolton *v.* Penn. Company, 88 Ibid. 261; Baltimore & O. R. R. Co. *v.* May, 25 Ohio State, 347; Wigwall *v.* Union C. & M. Co., 37 Iowa, 129.

[1] Wise *v.* Hilton, 4 Maine, 435; Olin *v.* Figeroux, 1 McMullan, 203; Miller *v.* McLain, 10 Yerger, 245; Lawrence *v.* Lane, 9 Illinois (4 Gilman), 354; Cooper *v.* McClun, 16 Ibid. 435; Gates *v.* Kerby, 13 Missouri, 157; Funkhouser *v.* How, 24 Ibid. 44; Dobbins *v.* Hyde, 37 Ibid. 114; Wilson *v.* Murphy, 45 Ibid. 409; Strauss *v.* Ayres, 87 Ibid. 348; Mankin *v.* Chandler, 2 Brockenbrough, 125; Lyman *v.* Cartwright, 3 E. D. Smith, 117.

[2] Parker *v.* Wilson, 61 Vermont, 116.

which he ought in that process to have been charged as the trustee of B.

"The same facts that would be required to maintain this declaration, would have been sufficient to charge the defendant as trustee in the former suit. To maintain this declaration the plaintiff would be obliged to show that, by fraudulent transfers and conveyances, property of B. came into the possession of the defendant, for which he was chargeable in that suit as trustee; otherwise he would not show that the defendant's disclosure was false, or that he had suffered any damage by losing a security for the payment of his debt against B.; but if the same facts had appeared in that suit, of course the trustee would have been charged.

"It is quite manifest that in this action the plaintiff seeks to try again the same question that was tried and decided in the former suit between the same parties. This, on well-settled principles, he cannot be permitted to do; and we are not able to see any peculiar hardship in the application of so familiar a general principle to this case.

"This action is of new impression. If the experiment should succeed, in all the numerous cases where plaintiffs seek to charge trustees on the ground of fraudulent conveyances made to them by debtors, after a judgment discharging the trustees, they might be sued again, as in this case, and the same question tried anew in another action." [1]

§ 707. The discharge of a garnishee upon his examination is no bar to an action by the defendant for any cause of action existing at the time of the discharge.[2] Nor does a judgment in favor of the garnishee in one attachment suit preclude his being charged as garnishee on account of the same debt, in another suit in favor of a different party.[3] Nor does the judgment against the garnishee amount to *res judicata*, as between him and the defendant, so as to preclude the latter from claiming more in his action than the garnishee was considered, in the attachment proceedings, to owe. Were such the case, it would be in the power of a garnishee, by confessing in his answer a smaller indebtedness than actually existed, to practise an irremediable fraud upon his creditor.[4]

[1] Lyford v. Demerritt, 32 New Hamp. 234.

[2] Puffer v. Graves, 6 Foster, 256.

[3] Spruill v. Trader, 5 Jones, 39; Breading v. Siegworth, 29 Penn. State, 396. *Sed contra*, Smith v. Stratton, 56 Vermont, 362.

[4] Robeson v. Carpenter, 7 Martin, N. s.

§ 708. Though judgment against the garnishee, and satisfaction thereof, constitute a complete bar to an action by the attachment defendant, to the extent of the amount so paid, is the judgment alone, without satisfaction, such a bar? On this point the authorities do not agree. In England it is held, that attachment and condemnation of a debt is a bar to an action upon the same debt.[1] In this country the same has been held in Maine,[2] Massachusetts,[3] Florida,[4] Indiana,[5] and Kentucky.[6] The Circuit Court of the United States for the Third Circuit held, that a judgment in attachment, where the attachment was laid on effects in the plaintiff's hands, might be pleaded in bar, by way of offset, or given in evidence on notice.[7] In Pennsylvania and Maryland, however, to entitle the garnishee to a plea in bar, it must appear that he has been compelled to pay the debt, or that an execution has been levied on his property.[8] And in Georgia, in an action by an indorsee against the maker of a promissory note, transferred to him after the maker had been summoned as garnishee, it was decided that the recovery of judgment against the garnishee, without satisfaction, did not constitute a defence to the action; and that if, after judgment obtained against the maker of the note, he should satisfy the judgment rendered against him as garnishee, the judgment on the note would thereby be extinguished; except, perhaps, for costs.[9] And in Ala-

30; Brown *v.* Dudley, 33 New Hamp. 511; Cameron *v.* Stollenwerck, 6 Alabama, 704; Baxter *v.* Vincent, 6 Vermont, 614; Barton *v.* Albright, 29 Indiana, 489; Ruff *v.* Ruff, 85 Penn. State, 333. See Tams *v.* Bullitt, 35 Penn. State, 308, where it was held, that a judgment against a garnishee is no bar to an action by the assignees in insolvency of a defendant, to recover from him more than he was charged for as garnishee.

[1] Savage's Case, 1 Salkeld, 291; McDaniel *v.* Hughes, 3 East, 367; Turbill's Case, 1 Saunders, 67, Note 1.

[2] Matthews *v.* Houghton, 11 Maine, 377; Norris *v.* Hall, 18 Ibid. 332; McAllister *v.* Brooks, 22 Ibid. 80. But it must be a final judgment, not a judgment by default merely. Therefore, where, under the practice in Maine, a garnishee was defaulted, and judgment was rendered against the goods, effects, and credits of the defendant in his hands; and afterwards on *scire facias*, he appeared and disclosed to the court that he was not liable as garnishee, and was discharged; and afterwards, when sued by the defendant, undertook to set up the judgment by default in bar of the action; it was held to be no bar, although the judgment by default was rendered before, and the discharge of the garnishee ordered after, the commencement of the defendant's suit against him. Sargeant *v.* Andrews, 3 Maine, 199.

[3] Perkins *v.* Parker, 1 Mass. 117; Hull *v.* Blake, 13 Ibid. 153.

[4] Sessions *v.* Stevens, 1 Florida, 233.

[5] Covert *v.* Nelson, 8 Blackford, 265; King *v.* Vance, 46 Indiana, 246.

[6] Coburn *v.* Currens, 1 Bush, 242.

[7] Cheongwo *v.* Jones, 3 Washington C. C. 359.

[8] Lowry *v.* Lumbermen's Bank, 2 Watts & Sergeant, 210; Brown *v.* Somerville, 8 Maryland, 444.

[9] Brannon *v.* Noble, 8 Georgia, 549.

bama, satisfaction of the judgment against the garnishee is necessary to absolve him from liability.[1] And so in Texas.[2]

The Supreme Court of Massachusetts, however, has somewhat modified its first ruling on this subject, holding that where it does not appear that execution has been awarded against the garnishee, and that he has been called on or compelled to pay, it is not such a payment, merger, or discharge of the original debt as to be pleaded in bar;[3] and this position was taken by the United States District Court for the Southern District of New York.[4]

§ 709. A case came before STORY, J., on the circuit, in which the effect to be given to a judgment against a garnishee, was considered, where it appeared that the plaintiff in the attachment had, by his neglect to comply with the local laws, put his judgment in a state of suspension, so that execution could not issue upon it, and it could not be revived by a *scire facias*. The court held, that the lien of the judgment against the garnishee was lost by the *laches* of the plaintiff, and that the judgment was no defence against an action for the debt.[5]

§ 710. There can be no doubt that, as a general rule, where a part or the whole of the debt of the garnishee to the defendant has been paid under the judgment against him, such payment is as effectual a bar, either *pro tanto* or complete, to a subsequent action by the defendant upon that debt, as if the payment had been made to the defendant himself.[6] And where, in an action against the garnishee by his creditor, the attachment defendant, the agreed statement of facts submitted to the court was silent as to whether the amount of the judgment against the garnishee was equal to his debt to the defendant, it was presumed to have been so.[7] And a payment of a debt by one of several joint debtors under garnishment, is a good defence for all against a suit by the defendant.[8] After a payment into court by the garnishee of the amount of his debt to the defendant, where the

[1] Cook *v.* Field, 3 Alabama, 53; Sharpe *v.* Wharton, 85 Ibid. 225.
[2] Farmer *v.* Simpson, 6 Texas, 303.
[3] Meriam *v.* Rundlett, 13 Pick. 511.
[4] McCarty *v.* Steam Propeller, &c., 4 Federal Reporter, 818.
[5] Flower *v.* Parker, 3 Mason, 247.
[6] *Ante*, § 706; Brown *v.* Dudley, 33 New Hamp. 511; Gunn *v.* Howell, 35 Alabama, 144; Dole *v.* Boutwell, 1 Allen, 286; Ladd *v.* Jacobs, 64 Maine, 347; Allen *v.* Watt, 79 Illinois, 284; Hannibal & St. J. R. R. Co. *v.* Crane, 102 Ibid. 261; St. Louis, I. M. & S. R. Co. *v.* Richter, 48 Arkansas, 349.
[7] McAllister *v.* Brooks, 22 Maine, 80.
[8] Cook *v.* Field, 3 Alabama, 53.

defendant claims it as exempt, but his claim is overruled, he cannot maintain an action against the garnishee to recover the debt.[1]

§ 710 *a*. Wherever such a payment would avail the garnishee, it will equally avail one collaterally and contingently so bound as to become liable to pay the debt in respect of which the garnishee was charged. Thus, where A., a defendant in a judgment, removed the judgment to the appellate court, and in order thereto gave a bail bond with B. as surety; and afterwards A. was compelled by an attachment proceeding in another State to pay the amount of the judgment; and after such payment the judgment was affirmed by the appellate court; and B. was sued on the bail bond; it was held, that A.'s payment under the attachment was a valid defence in favor of B.[2]

§ 711. Where a payment under a judgment against a garnishee is relied on as a defence to a suit by the attachment defendant, it is important to observe the rules upon which it will be sustained. They may be compendiously stated as follows: —

1. The judgment against the garnishee, under which he alleges he made the payment, must be proved.[3] Of course, the proper evidence of the judgment is a duly certified exemplification of the record; but in Massachusetts it was held, that a recital of the judgment in the execution against a garnishee justified him in paying the amount thereof, and that the payment so made was a good defence by him in an action against him by the attachment defendant.[4]

2. It must have been a valid judgment. No payment made under a void judgment, however apparently regular the proceedings may have been, can protect the garnishee against a subsequent payment to the defendant or his representatives. Thus, where an attachment was obtained against one supposed to be living in a foreign country, but who was dead when the suit was commenced, it was held, that a payment made by a garnishee, under execution, was no defence against an action by the defendant's administrator; the whole proceedings in the suit being a mere nullity.[5]

[1] Turner *v.* Sioux City & P. R. R., 19 Nebraska, 241.

[2] Noble *v.* Thompson Oil Co., 69 Penn. State, 409.

[3] Barton *v.* Smith, 7 Iowa, 85.

[4] Leonard *v.* New Bedford Savings Bank, 116 Mass. 210.

[5] Loring *v.* Folger, 7 Gray, 505. See Pounds *v.* Hamner, 57 Alabama, 342.

3. The payment must not have been voluntary. Any payment not made under execution will be regarded as voluntary, and, therefore, no protection to the garnishee;[1] unless the law authorized the court to require the garnishee to pay the money into court; when such a payment will be regarded as, in legal effect, the same as a payment under execution.[2]

4. The payment must be actual, and not simulated or contrived. Thus, where certain persons were charged as garnishees, and credited the plaintiff on their books with the amount of the judgment, and debited the defendant with the same amount, but did not in fact pay the money, it was held to be no payment.[3]

5. The judgment under which the payment was made must have been rendered by a court having jurisdiction of the subject-matter and the parties. If there be a defect in this respect, the payment will be regarded as voluntary, and therefore unavailing.[4] If, however, the court have jurisdiction of the subject-matter and the parties, it will be presumed, when a payment under the judgment is pleaded by the garnishee, that all the proper steps were taken to charge him;[5] and a payment on execution under its judgment will protect the garnishee, though the judgment may have been irregular, and reversible on error;[6] and a reversal of it by the defendant for irregularity, after payment by the garnishee, will not invalidate the payment.[7] But if the gar-

[1] Wetter *v.* Rucker, 1 Broderip & Bingham, 491; Edler *v.* Hasche, 67 Wisconsin, 653. In Missouri, where a judgment debtor was garnished, who paid the judgment under an execution afterwards issued, but which was irregular and might have been set aside on his application, the payment was held to be no protection against the garnishment. Home Mutual Ins. Co. *v.* Gamble, 14 Missouri, 407. See Burnap *v.* Campbell, 6 Gray, 241. In Alabama, it is held, that a garnishee against whom a judgment was regularly rendered, which could have been enforced by execution, might satisfy the judgment, without waiting to be coerced by execution. Mills *v.* Stewart, 12 Alabama, 90; Montgomery Gas Light Co. *v.* Merrick, 61 Ibid. 534.

[2] Ohio & M. R. W. Co. *v.* Alvey, 43 Indiana, 180; Rocheresu *v.* Guidry, 24 Louisiana Annual, 294.

[3] Wetter *v.* Rucker, 1 Broderip & Bingham, 491. See Brown *v.* Somerville, 8 Maryland, 444; Cutler *v.* Baker, 2 Day, 498; Troyer *v.* Schweiser, 15 Minnesota, 241.

[4] Harmon *v.* Birchard, 8 Blackford, 418; Ford *v.* Hurd, 4 Smedes & Marshall, 683; Robertson *v.* Roberts, 1 A. K. Marshall, 247; Richardson *v.* Hickman, 22 Indiana, 244; Stimpson *v.* Malden, 109 Mass. 313; Laidlaw *v.* Morrow, 44 Michigan, 547; Wells *v.* American Ex. Co., 55 Wisconsin, 23.

[5] Morgan *v.* Neville, 74 Penn. State, 52.

[6] Atcheson *v.* Smith, 3 B. Monroe, 502; Lomerson *v.* Hoffman, 4 Zabriskie, 674; Pierce *v.* Carleton, 12 Illinois, 358; Houston *v.* Walcott, 1 Iowa, 86; Stebbins *v.* Fitch, 1 Stewart, 180; Thompson *v.* Allen, 4 Stewart & Porter, 184; Gunn *v.* Howell, 35 Alabama, 144; Montgomery Gas Light Co. *v.* Merrick, 61 Ibid. 534; Webster *v.* Lowell, 2 Allen, 123.

[7] Duncan *v.* Ware, 5 Stewart & Porter, 119.

nishee contest the jurisdiction of the court, and his objection is overruled, and judgment rendered against him, a payment made by him under that judgment cannot be collaterally impeached elsewhere, on the ground that the court had no jurisdiction. Its decision on that point is conclusive in favor of the garnishee.[1]

6. Though the court have jurisdiction of the parties, and its judgment be valid as against the garnishee, yet if the law require the plaintiff, as a condition precedent to obtaining execution, to do a particular act, and without performing the condition, he obtain execution, and the garnishee make payment under it, the payment will be no protection; for it is in the garnishee's power to resist the payment until the condition be fulfilled; failing in which, his payment is regarded as voluntary. Thus, in Pennsylvania, where a statute required that before payment could be exacted from a garnishee, the plaintiff should give a bond to answer to the defendant, if he should, within a year and a day, disprove or avoid the debt; and a garnishee paid the amount of the judgment to the attachment plaintiff, without execution, and without such bond being given; it was held, that, as his defence to an action on the debt rested on his having been compelled by due course of law to pay it as garnishee, and he in fact had not and could not have been compelled so to pay it, the payment he had made was no defence to the action.[2] The same view was entertained in Mississippi,[3] and in Iowa.[4] In the last-named State the law provides that a garnishee shall not be made liable on a debt due by negotiable or assignable paper, unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon, after he may have satisfied the judgment; and it was there held, that if such a garnishee suffer judgment to go against him, in an action against the payee of the paper, without requiring such exoneration or indemnification, he cannot set up a payment made by him under the judgment as a defence to an action by an assignee of the paper, who acquired title to it before the garnishment.[5]

§ 712. To entitle a garnishee to the protection of a judgment against him as such, all the facts required by statute to enable the attachment plaintiff to hold the debt due by the garnishee, must appear in the record of the attachment suit; and if it appear

[1] Wyatt's Adm'r *v.* Rambo, 29 Alabama, 510; Gunn *v.* Howell, 35 Ibid. 144.

[2] Myers *v.* Urich, 1 Binney, 25. See Moyer *v.* Lobengeir, 4 Watts, 390.

[3] Oldham *v.* Ledbetter, 1 Howard (Mi.), 43; Grisson *v.* Reynolds, Ibid. 570.

[4] McPhail *v.* Hyatt, 29 Iowa, 137.

[5] Yocum *v.* White, 36 Iowa, 288.

that the attachment was not legally served on the garnishee, so as to reach the debt in his hands, his answering as garnishee, and the subsequent judgment against him, will not avail him.[1]

§ 713. Is the garnishee to be held responsible for the *regularity* of the proceedings in the suit in which he is garnished? We have seen that he is not allowed to take advantage of irregularities or errors in those proceedings, in order to avoid or reverse a judgment against him.[2] Manifestly, then, there can be not the least obligation on him to watch their regularity, nor can he in any way be held responsible for it.[3]

§ 714. In order to entitle one to plead an attachment as a conclusive defence, there should be no neglect, collusion, or misrepresentation on his part, in the progress of the attachment suit. For if his conduct be deceptive, and his statements untrue, and especially if this be so in collusion with the attachment plaintiff, the judgment will not be conclusive against his creditor.[4] Thus, one was summoned as garnishee of A., and answered that he was indebted to A., *as guardian*, on a promissory note given for a parcel of land; which note was secured by deed of trust on the land. The attachment plaintiff traversed the truth of the answer, alleging that the note or debt was due to A. individually, and not as guardian. Afterwards, when the case was called for trial, the garnishee failed to appear; and the plaintiff proceeded to introduce testimony, and there was judgment against the garnishee. The law afforded him means to protect himself by a bill of interpleader, and otherwise, from an unjust judgment, but he failed to avail himself thereof. It was held, that the judgment against him, and payment thereof, did not affect the rights of the guardian or the ward, nor constitute any defence against the payment of the garnishee's debt on the note to the guardian.[5]

In Delaware was a case, where the judgment against the garnishee, which he set up as a defence, was not rendered upon a verdict, but upon a reference entered into between the garnishee

[1] *Ante*, § 451 *b*; Desha *v.* Baker, 3 Arkansas, 509.

[2] *Ante*, § 697.

[3] Palmer *v.* Ballard, 3 Stewart, 326; Tubb *v.* Madding, Minor, 129; Gildersleeve *v.* Caraway, 19 Alabama, 246; Morrison *v.* New Bedford Institution, 7 Gray, 267; Wheeler *v.* Aldrich, 13 Ibid. 51; Burton *v.* District Township, 11 Iowa, 166.

[4] *Ante*, § 480; Coates *v.* Roberts, 4 Rawle, 100; Seward *v.* Heflin, 20 Vermont, 144; Smith *v.* Dickson, 58 Iowa, 444; Terre Haute & I. R. Co. *v.* Baker, 122 Indiana, 433.

[5] Horton *v.* Grant, 56 Mississippi, 404.

and the attaching plaintiff; and it was sought to deprive him of the protection of his payment under that judgment, because it was the result of a reference; but the court held it to be as binding on him as a verdict, and, in the absence of fraud or collusion, equally a protection to him.[1]

§ 715. The importance of great care in the framing of a garnishee's answer is strikingly enforced, in connection with the subsequent use of the judgment against him as garnishee, as a defence to an action upon the debt in respect of which the judgment was rendered. For he cannot avail himself of such judgment, or of a payment under it, as a defence, unless it appear that the money paid was on account of the *same* debt for which he is sued.[2] And as the record of the recovery, including the answer of the garnishee, must be given in evidence in the action by the creditor against him who was garnishee, the latter should not fail to describe particularly in his answer the debt in respect of which he is garnished, and to state every fact within his knowledge having any bearing upon his liability; so that, afterwards, the record in the attachment suit shall exhibit all that is necessary to a successful defence against an action for the same debt. Thus, A. answered as garnishee, that he was indebted to the defendant, as executor of B., in a certain sum, but did not state the nature of the debt. Afterwards, on being sued by an assignee of a note given by his testator to the defendant, he pleaded in bar the judgment which had been rendered against him as garnishee, and payment thereof; but the plea was held bad, on demurrer, because it did not aver that the debt in respect of which he was garnished was the same as that sued on.[3] A. and B. were joint makers of a note to C. A. was summoned as garnishee of C., and did not answer, but suffered judgment by default to be given against him, and paid the judgment. Afterwards A. and B. were sued on the note by C., and set up the payment of the judgment as a payment *pro tanto;* but it was held insufficient, because in itself affording no evidence that A. was charged as garnishee on account of the note.[4]

§ 716. Where the answer of the garnishee is the basis of the judgment against him, and the matter constituting the gar-

[1] Stille *v.* Layton, 2 Harrington, 149.

[2] Cornwell *v.* Hungate, 1 Indiana, 156; Sangster *v.* Butt, 17 Ibid. 354; Dirlam *v.* Wenger, 14 Missouri, 548.

[3] Harmon *v.* Birchard, 8 Blackford, 418. See Humphrey *v.* Barns, Croke, Eliz. 691.

[4] Hutchinson *v.* Eddy, 29 Maine, 91. See Dirlam *v.* Wenger, 14 Missouri, 548.

nishee's liability is therein set forth, the record will sufficiently establish his defence, when sued by the attachment defendant; but where there was judgment by default against the garnishee, for want of answer, he must either be deprived of his defence, because the record does not show for what liability he was charged, or be permitted to show that fact by parol proof. As it is an invariable rule that the garnishee shall not be required to pay his debt twice, there can be no doubt that he may by parol proof identify the debt for which he was charged with that on which he is sued; and it was so held in Alabama.[1]

§ 717. Usually, as between the garnishee and the defendant in the attachment, difficulty may not arise from insufficiency in the garnishee's answer; but as between the garnishee and an assignee of the debt, cases are likely to occur, in which the garnishee may, for want of fulness and explicitness in his answer, be compelled to pay his debt a second time. If at any time prior to judgment against a garnishee, he become aware of an assignment of his debt, made before the garnishment, it is his duty to bring that fact to the attention of the court, in order that, if practicable, the assignee may be cited to substantiate his claim, or that the court may withhold judgment. If the garnishee, knowing the existence of such an assignment, make no mention of it in his answer, the judgment against him will be no protection to him against an action by the assignee.[2] Most especially will an assignment to himself of the debt be of no avail to him after judgment against him on his answer admitting assets in his hands, but omitting to mention an assignment of the assets to him by the defendant.[3]

[1] Cook *v.* Field, 3 Alabama, 53.

[2] Prescott *v.* Hull, 17 Johnson, 284; Colvin *v.* Rich, 3 Porter, 175; Lamkin *v.* Phillips, 9 Ibid. 98; Foster *v.* White, Ibid. 221; Johns *v.* Field, 5 Alabama, 484; Crayton *v.* Clark, 11 Ibid. 787; Smoot *v.* Eslava, 23 Ibid. 659; Stockton *v.* Hall, Hardin, 160; Milliken *v.* Loring, 37 Maine, 408; Bunker *v.* Gilmore, 40 Ibid. 88; Larrabee *v.* Knight, 69 Ibid. 320; Casey *v.* Davis, 100 Mass. 124; Wardle *v.* Briggs, 131 Ibid. 518; Greentree *v.* Rosenstock, 34 New York Superior Ct. 505; 61 New York, 583; Dawson *v.* Jones, 2 Houston, 412; Tabor *v.* Van Vranken, 39 Michigan, 793. In Seward *v.* Heflin, 20 Vermont, 144, HALL, J., said: "I am not prepared to say, if a trustee make a full and fair disclosure of all the facts within his knowledge, and use all reasonable exertions to preserve the rights of an absent assignee, that a judgment against him shall not be a protection to him against such assignee. *But if the trustee make but a partial disclosure, so that the court have not opportunity to judge of the real merits of the case, and there be any indications of collusion between him and the creditor, the judgment should furnish him no protection whatever.*" See Marsh *v.* Davis, 24 Vermont, 363.

[3] Baker's Estate, 17 Philadelphia, 510.

In Alabama, the statutory practice is, where a garnishee fails to answer, to render judgment *nisi* against him for the full amount of the plaintiff's demand; upon which judgment a *scire facias* issues against the garnishee, returnable to the next term of the court, to show cause why final judgment should not be entered against him; and upon such *scire facias* being duly executed and returned, if the garnishee fail to appear, and discover on oath, the court confirms the judgment, and awards execution for the plaintiff's whole judgment and costs. In a case under this practice, the garnishee, without waiting for the *scire facias* to issue, paid the plaintiff the amount of the judgment *nisi*, and on being afterwards sued by the indorsee of a promissory note he had given to the attachment defendant, pleaded that payment in bar. It appeared that the writ in the action on the note was served on the maker of the note prior to the time when he would have been required by the *scire facias* — if one had been issued — to appear and answer; but no *scire facias* was issued. The court held, that the suit on the note, in favor of the indorsee, was a notice to the maker that his note had been transferred; and that fact having been brought to his knowledge before he could have answered under the *scire facias*, and before any final judgment could have been rendered against him, it was his duty to answer, and make known that he had received notice of the transfer of the note; and not having done so, he could not avail himself of his payment under the judgment *nisi*, as a bar to the action on the note.[1] A similar doctrine was announced in Indiana.[2]

In Mississippi, the courts have gone very far in requiring garnishees to sustain the rights of assignees. It was there held, that the garnishee, even after execution issued against him, upon learning that the debt attached in his hands had been assigned previous to the garnishment, is bound to protect himself against the execution by a bill of interpleader; and that if he fail to do so, and satisfy the judgment, it will be in his own wrong, and constitute no valid defence to the claim of the assignee.[3] But afterwards, when one against whom judgment had been rendered as garnishee, and also as defendant in a suit by the assignee of the debt, filed a bill of interpleader against both

[1] Johns *v.* Field, 5 Alabama, 484. See Colvin *v.* Rich, 3 Porter, 175; Foster *v.* White, 9 Ibid. 221; Kimbrough *v.* Davis, 34 Alabama, 583.

[2] Smith *v.* Blatchford, 2 Indiana, 184.

[3] Oldham *v.* Ledbetter, 1 Howard (Mi.), 43.

the plaintiffs, *the same court held, that it would not lie, and left the party to pay his debt twice.*[1]

§ 718. It is the duty, not less than the interest, of an assignee of a *chose in action*, to put it in the power of the maker to disclose its assignment, in any answer he may have to give as garnishee of the assignor, by notifying him, and exhibiting to him the evidence thereof, that he may be able to state the whole matter to the court. It is not to be considered that, in all cases, a failure on the part of the assignee to exhibit to the maker such evidence will defeat or seriously prejudice his claim; but in any system of practice where the garnishee's liability turns altogether on the terms of his answer, and where the effect given to a statement by him of an assignment of the *chose in action*, in respect of which it is sought to charge him, depends, as in Massachusetts, upon the evidence which the answer affords of the existence and legal efficacy of such assignment, it is indispensable that the assignee should produce to the garnishee such evidence of his title as will justify the garnishee in setting out the assignment as an existing fact, and as will support the assignment against the attaching creditor.[2] Therefore, where A. gave an unnegotiable note to B., and was afterwards summoned as garnishee of B.; and in his answer disclosed that, since the service of the writ, C. had informed him that the note was his property, and that B. acted as his agent in taking it, but exhibited no evidence of his property in the note; and A. in his answer did not state his belief that C.'s statement was true, or that the note was C.'s, and he was thereupon charged as garnishee, and satisfied the judgment; and afterwards was sued by C. on the debt; it was held, that the judgment against A., as garnishee, was a good defence to the action; the main ground assumed being that C. had failed to exhibit such evidence of his title as would authorize A. to express his belief in its existence and validity.[3]

§ 719. It is still more important that notice of the transfer of a note should be given to the maker, where, as in some States, such transfer takes effect, as regards him, only from the time of such notice; for if, previous to notice, the maker be subjected to

[1] Yarborough *v.* Thompson, 3 Smedes & Marshall, 291.

[2] Wood *v.* Partridge, 11 Mass. 488; McAllister *v.* Brooks, 22 Maine, 80.

[3] Wentworth *v.* Weymouth, 11 Maine, 446.

garnishment as a debtor of the payee, and be compelled to pay the amount of the note, the assignee cannot afterwards maintain an action against him. Thus, in Massachusetts, in a suit brought there by the indorsee against the maker of a promissory note, given in Connecticut, by one citizen of that State to another, and there indorsed to a citizen of Massachusetts, — which note was not negotiable by the law of Connecticut; it was held to be a good defence, that the maker, before he had notice of the indorsement, had been summoned as garnishee of the payee, and had paid the amount of the note on an execution issued against him as garnishee.[1]

§ 720. In pleading a recovery against the maker of a note, as garnishee of the payee, it is not necessary that the plea should aver, *in totidem verbis*, that the maker had no notice of the transfer of the note, before he answered the garnishment. If he had notice, the plaintiff should reply the fact and establish it.[2]

§ 721. If the garnishment of the maker of a note, and judgment against him, and satisfaction of the judgment, before he has notice of its transfer, would be held to bar the right of the holder to recover against the maker, much more will his right be barred where he takes the note with express notice of the pendency of the garnishment.[3]

§ 722. In *assumpsit*, the recovery and execution in the attachment may either be pleaded specially or given in evidence under the general issue;[4] but in debt on bond it must be pleaded. Care must be taken to plead it properly, for if the defendant fail for want of a proper plea, it is said that the party must pay the money over again, and has no remedy either in law or equity.[5]

§ 723. Neither in giving an attachment in evidence under the general issue, nor in pleading it, is the defendant bound to prove that the plaintiff in the attachment had a sufficient cause of action. For it would oftentimes defeat the whole effect of the attachment laws, if the garnishee should, without the means of proving it, be held to such proof.[6] This however, is held only

[1] Warren *v.* Copelin, 4 Metcalf, 594.
[2] Mills *v.* Stewart, 12 Alabama, 90.
[3] Glanton *v.* Griggs, 5 Georgia, 424.
[4] Cook *v.* Field, 3 Alabama, 53.
[5] Turbill's Case, 1 Saunders, 67, Note 1; Coates *v.* Roberts, 4 Rawle, 100.
[6] McDaniel *v.* Hughes, 3 East, 367; Morris *v.* Ludlam, 2 H. Black. 362.

in cases where the attachment is laid in the hands of third persons; not where the party attaches money in his own hands. In that case, when sued for the debt, the plaintiff may reply that he was not indebted to the defendant, and the defendant will be held to prove the debt.[1]

[1] Sergeant on Attachment, 2d Edition, McDaniel v. Hughes, 3 East, 367; Morris 166; Paramore v. Pain, Cro. Eliz. 598; v. Ludlam, 2 H. Black. 362.

CHAPTER XXXIX.

ACTION FOR MALICIOUS ATTACHMENT.

§ 724. In the chapter on Attachment Bonds,[1] we considered the responsibility of an attachment plaintiff to the defendant, for an attachment which was merely wrongful, and not obtained maliciously and without probable cause. We now propose an examination of the recourse of the defendant, upon common-law principles, for an attachment maliciously sued out.

§ 725. Whether an attachment was wrongfully sued out, cannot be made the subject of inquiry between the parties thereto, except in the attachment suit itself, or in an action brought by the defendant therein against the plaintiff for the wrong. Hence where one whose property had been attached and sold, brought trover for the value thereof against the attaching plaintiff, and it appeared that the attachment was issued conformably to statute, it was held, that it could not be impeached in a collateral way in such an action, on the ground that it was wrongfully sued out.[2]

§ 726. It has been uniformly held in this country, that an attachment plaintiff may be subjected to damages for attaching the defendant's property maliciously and without probable cause. The defendant's remedy in this respect is not at all interfered with by the plaintiff's having at the institution of the suit, given a bond, with security, conditioned to pay all damages the defendant might sustain by reason of the attachment having been wrongfully obtained;[3] nor is he precluded from maintaining his action for damages by his having given a delivery bond for the property attached;[4] nor by his having consented to the dismissal

[1] *Ante*, Chapter VI.

[2] Rogers *v.* Pitman, 2 Jones, 56.

[3] Sanders *v.* Hughes, 2 Brevard, 495; Donnell *v.* Jones, 13 Alabama, 490; Smith *v.* Story, 4 Humphreys, 169; Pettit *v.* Mercer, 8 B. Monroe, 51; Senecal *v.* Smith, 9 Robinson (La.), 418; Preston *v.* Cooper, 1 Dillon, 589; Lawrence *v.* Hagerman, 56 Illinois, 68; Spaids *v.* Barrett, 57 Ibid. 289.

[4] Alexander *v.* Jacoby, 23 Ohio State, 358.

of the attachment suit.[1] On the contrary, a dismissal by stipulation between the parties, providing that each party should pay his own costs, is such a determination of the action in favor of the defendant as will enable him to maintain an action for malicious prosecution.[2] But, in the absence of any statute conferring the right, the defendant cannot maintain an action against the plaintiff for the mere wrongful suing out of the attachment. Such an action, as we have seen, may be maintained on the attachment bond;[3] but, on common-law principles, the element of malice is indispensable to authorize an action on the case.[4]

§ 727. This action cannot be maintained against an attachment plaintiff, on account of an attachment maliciously obtained, without his knowledge, by an attorney-at-law employed by him to collect a debt;[5] but the attorney is liable in such case; and where he and his client act in concert they are both liable.[6] And where a person gave another a *carte blanche* to use his name as plaintiff in prosecuting suits, without requiring to be informed as to the facts and circumstances of the suit; the two to share the compensation between them; he cannot, if a suit is commenced in his name, maliciously and without probable cause, shield himself from damages on the ground of ignorance, or on the pretence that he might have supposed there was a good cause of action.[7] But if a creditor, living in a different State from his debtor, entrust a claim against the latter to a reputable attorney in the State of the debtor's residence for collection, and that attorney informs him that there exists a ground for suing out an attachment, and thereupon he orders the attachment issued, and, at the attorney's request, furnishes resident sureties in the attachment bond; if there be no evidence of his having had other knowledge or information, malice cannot be imputed to him, nor exemplary or vindictive damages recovered against him.[8]

§ 728. It is no obstacle to the institution and maintenance of this action, that the attachment was obtained in a court within a foreign jurisdiction. The question is, not where the attach-

[1] Spaulding *v.* Wallett, 10 Louisiana Annual, 105.
[2] Kinsey *v.* Wallace, 36 California, 462.
[3] *Ante*, Chapter VI.
[4] McKellar *v.* Couch, 34 Alabama, 336; Benson *v.* McCoy, 36 Ibid. 710.
[5] Kirksey *v.* Jones, 7 Alabama, 622; Pollock *v.* Gantt, 69 Ibid. 373.
[6] Wood *v.* Weir, 5 B. Monroe, 544.
[7] Kinsey *v.* Wallace, 36 California, 462.
[8] City Nat. Bank *v.* Jeffries, 73 Alabama, 183.

ment issued, but whether it was justifiable. If issued in a foreign State, the forms of the proceeding must be tested by the laws of that State; but if valid in form under those laws, the question still remains, whether the plaintiff perverted those forms to the purpose of oppression; and this is for the determination of the court, domestic or foreign, in which it may arise.[1]

§ 729. This action being governed by the principles of the common law applicable to actions for malicious prosecution,[2] case, and not trespass *vi et armis*, is the proper form of remedy.[3] As a general rule, it will not lie until the attachment shall have terminated in favor of the defendant;[4] but an omission to aver in the declaration its termination, is cured by verdict.[5] If in the attachment suit the defendant has no opportunity to defend, this rule does not apply. This was so held in New York, in a case where the attachment was prosecuted to judgment *ex parte*, in the absence of the defendant;[6] and in Ohio, where the attachment was auxiliary to a pending suit, and the statute did not authorize the defendant to contest the truth of the grounds averred by the plaintiff for obtaining the writ.[7]

§ 730. In Alabama, it is not sufficient to aver that the defendant caused and procured an attachment to be wrongfully and maliciously and without probable cause sued out against the plaintiff, and that the writ was placed in the hands of a sheriff, and was by him executed. The defendant must be connected by averment with the execution of the process, by delivering the writ to the officer, or participating in his proceedings.[8] But in Missouri, this doctrine was not followed. There, the court said: "We are not willing to concede that it is necessary to the maintenance of the action that the defendant should in person deliver the writ to the officer, or be present and point out the property and tell him what to do. It is the duty of the court to

[1] Wiley *v.* Traiwick, 14 Texas, 662.

[2] *Post*, § 732.

[3] Shaver *v.* White, 6 Munford, 110; Ivy *v.* Barnhartt, 10 Missouri, 151; Lovier *v.* Gilpin, 6 Dana, 321.

[4] Bump *v.* Betts, 19 Wendell, 421: Rea *v.* Lewis, Minor, 382; Nolle *v.* Thompson, 3 Metcalfe (Ky.), 121; Feazle *v.* Simpson, 2 Illinois (1 Scammon), 30; Sloan *v.* McCracken, 7 Lea, 626; Pixley *v.* Reed, 26 Minnesota, 80; Reynolds *v.* De Geer, 13 Bradwell, 113; Stewart *v.* Sonneborn, 98 United States, 187; McCracken *v.* Covington C. N. Bank, 4 Federal Reporter, 602.

[5] Rea *v.* Lewis, Minor, 382; Nolle *v.* Thompson, 3 Metcalfe (Ky.), 121; Feazle *v.* Simpson, 2 Illinois (1 Scammon), 30; Spaids *v.* Barrett, 57 Ibid. 289.

[6] Bump *v.* Betts, 19 Wendell, 421.

[7] Fortman *v.* Rottier, 8 Ohio State, 548.

[8] Marshall *v.* Betner, 17 Alabama, 832.

deliver the process to its executive officer, and it is the duty of that officer to levy the attachment on whatever property may be necessary to satisfy the same. The plaintiff in the suit sets the whole proceeding in motion by making out the affidavit, and if he does the same maliciously, vexatiously, and without probable cause, and injury results from his unlawful and wrongful act, he is liable and must respond in damages." [1]

§ 730 *a*. In such an action, before the defendant can be called upon to sustain the truth of the affidavit upon which the attachment was issued, the plaintiff must aver in his declaration that the ground taken in the affidavit was false,[2] and must give some evidence of its falsity, or of circumstances from which the jury could infer its falsity. His right to recover depends on the vexatious use of the process; and to make this out, the *onus* is, in the first instance, on him.[3] And he must show that the attachment was issued groundlessly, before he can recover for its having been sued out vexatiously.[4]

§ 731. In such an action a return of the sheriff on the attachment, "*not executed by order of the plaintiff*," does not disprove the fact that an attachment was made. Though given in evidence by the plaintiff, he may contradict it, and show by parol proof that the writ was executed.[5]

§ 732. The earliest adjudication concerning this action in this country, with which we have met, was in Virginia, in 1803, when it was decided that no action could be sustained, unless it appeared that the plaintiff, in attaching the defendant's property, acted maliciously and without probable cause; and that it was not sufficient for the declaration to aver that the attachment was "without any *legal* or *justifiable* cause;" but it must allege the want of *probable* cause.[6] This doctrine has since been recognized and affirmed in many States.[7] In Virginia, however, in

[1] Walser *v.* Thies, 56 Missouri, 89.

[2] Tiller *v.* Shearer, 20 Alabama, 527; Durr *v.* Jackson, 59 Ibid. 203; Flournoy *v.* Lyon, 70 Ibid. 308.

[3] O'Grady *v.* Julian, 34 Alabama, 88. See Burrows *v.* Lehndorff, 8 Iowa, 96,

[4] City Nat. Bank *v.* Jeffries, 73 Alabama, 183.

[5] Mott *v.* Smith, 2 Cranch C. C. 33.

[6] Young *v.* Gregorie, 3 Call, 446; King *v.* Montgomery, 50 California, 115.

[7] Lindsay *v.* Larned, 17 Mass. 190; Wills *v.* Noyes, 12 Pick. 324; Ives *v.* Bartholomew, 9 Conn. 309; Bump *v.* Betts, 19 Wendell, 421; Boon *v.* Maul, Pennington, 2d Ed. 631; McCullough *v.* Grishobber, 4 Watts & Sergeant, 201; Tomlinson *v.* Warner, 9 Ohio, 103; Fortman *v.* Rottier, 8 Ohio State, 548; Lawrence *v.* Hagerman, 56 Illinois, 68; Spaids *v.* Barrett, 57 Ibid. 289; Smith *v.* Story, 4 Humphreys, 169; Williams *v.* Hunter,

1859, it was held, that under the broad and comprehensive terms of the statute of jeofails of that State, adopted after the first ruling on this subject, as just stated, a declaration charging that the attachment was sued out "wrongfully and without good cause," was good after verdict; because proof that it was sued out maliciously and without probable cause, would be entirely consistent with the allegation as laid; and it might well be that the same testimony relied on to establish the latter would furnish sufficient proof of the former.[1] And in Illinois, while it was recognized that the averment of the want of probable cause is of the gist of the action, it was considered that the words "without any reasonable or probable cause" are not indispensable in the declaration, provided language be used having the same meaning, and the want of probable cause be included in the sense of the declaration.[2]

§ 732 *a*. The essential ground is, that the proceedings complained of were had without probable cause; inasmuch as, from the want of such cause, the other main ingredient, malice, may be, and most commonly is, implied;[3] while from the proof of even *express* malice the want of probable cause cannot be inferred. It is, therefore, important to determine what is probable cause. It is not referable to the state of facts actually existing when the attachment suit was brought, without regard to whether the plaintiff therein knew of those facts, and based his proceedings upon them; for, in the language of the Court of Appeals of Virginia, that "would be in effect to allow a party sued for a malicious prosecution to say to the plaintiff, by way of defence, 'It is true you are innocent of the offence with which you were charged, and at the time of instituting the prosecution I knew of no circumstances to justify me in believing you to be guilty, and did not so believe; but I have since ascertained that there existed at the time certain facts and circumstances, which, had they been then known to me, would have warranted me in believing you guilty.'" Probable cause is, therefore, to be referred to the justifiable belief of the party, based on a knowledge, at the

3 Hawks, 545: Senecal *v.* Smith, 9 Robinson (La.), 418; Wiley *v.* Traiwick, 14 Texas, 662; Sledge *v.* McLaren, 29 Georgia, 64; Accessory Transit Co. *v.* McCerren, 13 Louisiana Annual, 214; Mitchell *v.* Mattingly, 1 Metcalfe (Ky.), 237; Wood *v.* Weir, 5 B. Monroe, 544; Moody *v.* Deutsch, 85 Missouri, 237; Parmer *v.* Keith, 16 Nebraska, 91.

[1] Spengler *v.* Davy, 15 Grattan, 381.

[2] Spaids *v.* Barrett, 57 Illinois, 289.

[3] Walser *v.* Thies, 56 Missouri, 89; Holliday *v.* Sterling, 62 Ibid. 321.

time, of facts and circumstances justifying that belief; or, in other words, it is, substantially, belief founded on reasonable grounds.[1]

§ 733. The malice necessary to support this action is any improper motive. It need not imply malignity, nor even corruption, in the appropriate sense of those terms. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or to do a wrong and unlawful act, knowing it to be such, constitutes legal malice.[2] If, for instance, a person commence an action by attaching the goods of the defendant, knowing that he has no cause of action, he is considered to have intended to vex, harass, and injure him; and this is sufficient evidence of malice.[3] So, though he have a cause of action, if he allege, as a ground for obtaining the attachment, that which he knows to be false, it is express malice.[4] But the malice must be against the defendant; if it be directed against a third person, it will not authorize the recovery by the defendant of vindictive damages.[5]

§ 734. In Massachusetts, the action cannot be sustained, unless the evidence be satisfactory that the plaintiff *knew*, when he commenced his action by attachment, that he had no cause of action, and that he acted maliciously in that behalf. Therefore, where the declaration alleged that the attachment plaintiff knew he had no lawful cause of action against the defendant when the action by attachment was commenced, and that he acted maliciously in commencing it without any just cause, and also in attaching and detaining plaintiff's property; it was held, that the declaration was not supported by evidence that he had attached the property under a belief that he had a good cause of

[1] Spengler *v.* Davy, 15 Grattan, 381. In Illinois probable cause was defined to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence charged. Barrett *v.* Spaids, 70 Illinois, 408.

[2] Wills *v.* Noyes, 12 Pick. 324; Culbertson *v.* Cabeen, 29 Texas, 247; Durr *v.* Jackson, 59 Alabama, 203; Nordhaus *v.* Peterson, 54 Iowa, 68; Carothers *v.* McIlhenny Co., 63 Texas, 138.

[3] Ives *v.* Bartholomew, 9 Conn. 309; Alexander *v.* Harrison, 38 Missouri, 258. In Alabama it was held, that the obtaining by the attachment plaintiff of a second attachment, a week after that on account of which the action for malicious attachment is brought, might be given in evidence on the question of malice. Ryall *v.* Marx, 50 Alabama, 31.

[4] Tomlinson *v.* Warner, 9 Ohio, 103.

[5] Wood *v.* Barker, 37 Alabama, 60; 1 Shepherd's Select Cases, 311.

action, and then maliciously detained it after he had learned that the suit was groundless.[1]

§ 735. In New Jersey it was held, that an action for malicious attachment would lie, where the attachment was sued out of a court having no jurisdiction; and that in the declaration it was not necessary to aver that the defendant *knew* that the court had not jurisdiction. And the court refused to allow the cause of action for which the attachment was obtained to be shown in evidence.[2]

§ 736. The doctrine intimated in the last-cited case in Massachusetts, that the plaintiff's *belief* of his having a cause of action will protect him from an action for malicious prosecution, has been distinctly recognized and announced in other States, in relation to the grounds on which the attachment is sued out, as distinct from the question of the existence of a cause of action. In North Carolina, it was decided that the plaintiff's belief, caused by the defendant's conduct, that the defendant as alleged in the affidavit had absconded, was sufficient to protect the plaintiff from this action, although in fact the defendant had not absconded.[3] So, in Pennsylvania it was held, that the question was not whether the attachment defendant had really absconded, but whether his conduct was such as to justify the plaintiff's apprehensions, and to make recourse to the attachment a measure of reasonable precaution.[4] So, in Tennessee, where the plaintiff sued out an attachment on the ground that the defendant was a non-resident of the State, when it appeared that, though he had been two years absent from the State, and had avowed his intention to remove, yet he had not in fact changed his domicile; and the attachment was dismissed; and the defendant brought his action against the plaintiff for damages; it was held, that a recovery could not be had merely on the ground that the attachment had been obtained when it ought not to have been, but that the probable cause given by the defendant must be taken into consideration as a defence.[5]

§ 737. But though the plaintiff's belief may protect him from an action for malicious prosecution, the question still arises, as

[1] Stone v. Swift, 4 Pick. 389. See Alexander v. Harrison, 38 Missouri, 258.

[2] Boon v. Maul, Pennington, 2d Ed. 631.

[3] Williams v. Hunter, 3 Hawks, 545.

[4] McCullough v. Grishobber, 4 Watts & Sergeant, 201.

[5] Smith v. Story, 4 Humphreys, 169.

to what will justify such a belief. In reference to the cause of action it may be easy to show the grounds of the belief; but perhaps not so, in regard to the special ground laid for obtaining the attachment. In such case it has been considered that mere representations made to the plaintiff by third parties, that the defendant was about to abscond, without any evidence that the charge was true, or that the plaintiff had any reason to believe it true, or made any inquiry into the matter, were no ground of defence to him when sued for malicious prosecution.[1]

§ 738. In Alabama, where, as we have seen,[2] actual damage for a merely wrongful attachment may be recovered, when no malice existed or is averred, the plaintiff's belief of the existence of a cause of action, or of facts authorizing the issue of an attachment, may be given in evidence to repel the presumption of malice, and thereby prevent the recovery of exemplary or vindictive damages;[3] and the declarations which the plaintiff made at the time the attachment was issued, as to his reasons for having it issued, may be given in evidence as a part of the *res gestæ*.[4] And so, in Louisiana, it was considered that if it was apparent that the plaintiff in the attachment had a sufficient or very probable cause of action, and was prevented from gaining a judgment by some technical objection, or irregularity in the proceedings, which could not be foreseen, the probability and justice of the demand might be pleaded, and given in evidence in mitigation of a claim for vindictive damages.[5]

These cases are equivalent to a recognition of the common-law principle we have been considering; for it is admitted that the plaintiff's belief, on proper grounds, would be sufficient to protect him from a recovery of those damages which, but for peculiar statutes, would be authorized by the common law, and could be recovered only on common-law grounds.

§ 739. In the cases cited, in which probable cause for the attachment is inquired into as a bar to the action, it will be found that no opportunity existed to investigate and determine that point in the attachment suit. Where, as in some States, the attachment defendant may preliminarily controvert and dis-

[1] Schrimpf *v.* McArdle, 13 Texas, 368.
[2] *Ante*, § 157.
[3] Donnell *v.* Jones, 13 Alabama, 490; White *v.* Wyley, 17 Ibid. 167.
[4] Wood *v.* Barker, 37 Alabama, 60; 1 Shepherd's Sel. Cases, 311; Dothard *v.* Sheid, 69 Alabama, 135.
[5] Cox *v.* Robinson, 2 Robinson (La.), 313.

prove the truth of the affidavit on which the attachment issued, that point could not properly become the subject of investigation in the action for malicious prosecution. For if the truth of the affidavit was tried in the attachment suit, and determined against the plaintiff there, the matter would be *res judicata*, and of course he could not, when sued by the defendant, set up the truth of the affidavit as a defence.[1] On the other hand, the attachment defendant, if the affidavit should have been found to be true, would be equally precluded, in the action for malicious prosecution, from contesting that point; or if he failed to put it in issue in the attachment suit, it would be an admission of the allegation in the affidavit, which he could not afterwards retract or deny.

§ 740. But even where this course may be pursued, it has been held, that an appearance to the attachment, entering special bail, and confessing judgment for only *a part* of the sum demanded, is not a waiver of the injury; for, said the court, "the defendant had no alternative but to enter special bail or see his property sacrificed for what was in fact not due. An appearance thus extorted is surely not an admission that the means employed were legal; and a creditor cannot compel the payment even of a just debt by illegal means."[2]

§ 741. In a suit for wrongfully and vexatiously suing out an attachment, on the ground of an intended departure of the debtor from the State, it is not admissible for the defendant to give in evidence, as proof of probable cause, declarations of the debtor made a few days before the issue of the attachment, which, when it was issued, *had not come to the knowledge* of the attachment plaintiff. Declarations accompanying an act of a party, from which act an inference is sought to be drawn prejudicial to him, are admissible in evidence, as characterizing the act, and as explanatory of the intention with which it was done. But, to form a part of the *res gestæ*, such declarations must be made at the time the act they are supposed to characterize was done, and must be calculated to elucidate and unfold the nature and quality of the facts they were intended to explain, and so to harmonize with those facts as obviously to constitute one transaction. Declarations not of this character, whether made before or after the act with which it is sought to connect

[1] Hayden *v.* Sample, 10 Missouri, 215.

[2] Foster *v.* Sweeney, 14 Sergeant & Rawle, 386.

them, are not part of the *res gestæ*, but independent facts, and are not admissible in evidence.[1]

§ 742. In such a case as that stated in the next preceding section, it is equally inadmissible for the plaintiff to rebut the evidence of probable cause, by proof that it was generally reputed in the neighborhood in which he lived that he was going abroad on a temporary visit, and would shortly return.[2]

§ 742 *a*. As neither indebtedness, pecuniary embarrassment, nor insolvency is *per se* a ground for attachment, so neither can justify the wrongful suing out of an attachment, or mitigate the offence of malice in obtaining it. The pecuniary condition of the defendant is only admissible in evidence on a trial of an action for malicious attachment, when it contributes to support some proposition which becomes material on the trial. Thus, where evidence was given of a sale by the attachment defendant of property at "a low down price;" and further evidence was given that the defendant, not long before the attachment issued, admitted "that he was involved," and "that he was broke;" it was held, that this evidence was clearly pertinent to the question of the *bona fides* of the sale; though standing alone, it would be inadmissible in justification or mitigation of the offence of malice.[3] And the insolvency of the attachment defendant may be given in evidence as a circumstance to be considered by the jury in ascertaining the damage he had sustained by his credit being injured.[4]

§ 743. It has been decided in Alabama, that the attachment plaintiff, when sued for malicious prosecution, is not confined, in his defence, to showing that the facts on which he sued out the attachment existed and amounted to a probable cause; but he may show that other causes existed, for which, under the statute, the attachment might have issued. For instance, where the ground on which the attachment was obtained was, that the defendant was about to dispose of his property fraudulently, with intent to avoid the payment of the debt sued for; it was held, in the action for malicious prosecution, that the question was, not whether the precise ground stated in the affidavit was true, but whether the attachment was wrongfully or vexatiously sued out;

[1] Havis v. Taylor, 13 Alabama, 324.
[2] Pitts v. Burroughs, 6 Alabama, 733; Havis v. Taylor, 13 Ibid. 324.
[3] Lockhart v. Woods, 38 Alabama, 631.
[4] Donnell v. Jones, 13 Alabama, 490. See Mayfield v. Cotton, 21 Texas, 1.

and that it was a complete defence, if the attachment plaintiff could show that any one of the causes existed which would have warranted him in resorting to the process; for instance, that the defendant was about to remove his property out of the State, with intent to avoid the payment of the debt upon which the attachment was founded.[1] In the same State, it was also intimated, that it might be shown to the jury, to repel the presumption of malice, that the plaintiff was indebted to the defendant in another State, and ran away from there with his property to avoid the payment of his debts.[2] And it was there decided, that while it was inadmissible for the defendant to prove that, when he sued out his attachment, there was another attachment in the hands of the sheriff against the same party, yet he might prove that another attachment had been issued, and his knowledge of that fact, previous to the issuing of his attachment, as tending to rebut the presumption of malice in him.[3] And so he may show in evidence that the attachment was taken out under advice of counsel; which is good to rebut the idea of malice, but not as a justification.[4]

§ 744. When, in the attachment suit, the plaintiff shall have recovered judgment, it is, until reversed, conclusive of probable cause, so far as indebtedness enters into that question; and in the action for malicious attachment there can be no re-examination of that point.[5] Not so, however, when the judgment in the attachment suit was for the defendant. There, the attachment plaintiff, when sued for malicious attachment, may, in order to show probable cause, give evidence to prove that there was a debt, though he failed to recover on it. The question is not whether a demand shall be recovered, upon which a jury has before passed, and the court, upon their verdict, has considered ought not to be recovered; but whether the attachment plaintiff had probable cause for instituting the proceeding, and, if he had not, whether he was influenced by malice. Any evidence, then, which goes to establish the existence of the demand at the time the attachment was issued, tends to prove probable cause, and

[1] Kirksey *v.* Jones, 7 Alabama, 622; Lockhart *v.* Woods, 38 Ibid. 631.

[2] Melton *v.* Troutman, 15 Alabama, 535.

[3] Yarborough *v.* Hudson, 19 Alabama, 653; Goldsmith *v.* Picard, 27 Ibid. 142; Lockhart *v.* Woods, 38 Ibid. 631.

[4] Raver *v.* Webster, 3 Iowa, 502; Stone *v.* Swift, 4 Pick. 389; Alexander *v.* Harrison, 38 Missouri, 258.

[5] Jones *v.* Kirksey, 10 Alabama, 839; Durr *v.* Jackson, 59 Ibid. 203.

to rebut the presumption of malice which would arise from the discharge of the defendant in the attachment suit.[1]

§ 745. The rules as to damages, applicable in other cases of malicious prosecution, apply to actions for malicious attachment. Those rules are thus expressed by Mr. Greenleaf: "Whether the plaintiff has been prosecuted by indictment, or by civil proceedings, the principle of awarding damages is the same, and he is entitled to indemnity for the peril occasioned him in regard to his life and liberty, for the injury to his reputation, his feelings, and his person, and for all the expenses to which he necessarily has been subjected. And if no evidence is given of particular damages, yet the jury are not therefore obliged to find nominal damages only. Where the prosecution was by suit at common law, no damages will be given for the ordinary taxable costs, if they were recovered in that action; but if there was a malicious arrest, or the suit was malicious and without probable cause, the extraordinary costs, as between attorney and client, as well as all other expenses necessarily incurred in defence, are to be taken into the estimate of damages."[2]

In Alabama it was held, that fees paid to counsel for defending the original suit, if reasonable and necessarily incurred, might be proved and taken into consideration by the jury in the assessment of damages;[3] and that injuries to the credit and business of a merchant, resulting from taking out an attachment against him on the ground of fraud, might legitimately be averred and proved.[4] And so in Illinois.[5] But where, in such a case, a witness was asked "what was the usual profit made by such establishments in the neighborhood of the plaintiff, in the same kind of business," the question was held inadmissible, because such testimony could furnish no reliable data for determining the loss sustained by the plaintiff; while its tendency was to multiply the issues before the jury almost indefinitely.[6]

[1] Marshall v. Betner, 17 Alabama, 832. See Gaddis v. Lord, 10 Iowa, 141.

[2] 2 Greenleaf on Evidence, § 456. See Walser v. Thies, 56 Missouri, 89.

[3] Marshall v. Betner, 17 Alabama, 832.

[4] Goldsmith v. Picard, 27 Alabama, 142; O'Grady v. Julian, 34 Ibid. 88; Flournoy v. Lyon, 70 Ibid. 308.

[5] Lawrence v. Hagerman, 56 Illinois, 68.

[6] O'Grady v. Julian, 34 Alabama, 88.

APPENDIX.

THE LEADING STATUTORY PROVISIONS OF THE SEVERAL STATES AND TERRITORIES OF THE UNITED STATES, IN RELATION TO SUITS BY ATTACHMENT.

ALABAMA.

Attachments may issue—I. To enforce the collection of a debt, whether it be due or not at the time the attachment is taken out: II. For any moneyed demand the amonnt of which can be certainly ascertained: III. To recover damages for a breach of contract, when the damages are not certain and liquidated: IV. When the action sounds in damages merely.

The following are the grounds upon which an attachment may be obtained:

1. When the defendant resides out of the State; or,
2. Absconds; or,
3. Secretes himself so that the ordinary process of law cannot be served on him; or,
4. Is about to remove out of the State; or,
5. Is about to remove his property out of the State, so that the plaintiff will probably lose his debt, or have to sue for it in another State; or,
6. Is about fraudulently to dispose of his property; or,
7. Has fraudulently disposed of his property; or,
8. Has money, property, or effects, liable to satisfy his debts, which he fraudulently withholds.

In cases where the cause of action comes under either of the first two classes above named, the plaintiff, his agent or attorney, must make affidavit of the amount of the debt or demand, and that it is justly due; and that one of the enumerated grounds of attachment exists; and that the attachment is not sued out for the purpose of vexing or harassing the defendant.

In cases where the cause of action comes under either of the third and fourth classes above named, the plaintiff, his agent or attorney, in addition to the affidavit required in other cases, must make affidavit of the special facts and circumstances, so as to enable the officer granting the writ to determine the amount for which a levy must be made.

Before the writ issues, the plaintiff, his agent or attorney, must execute a bond in double the amount claimed to be due, with sufficient surety, payable

to the defendant, with condition that the plaintiff will prosecute the attachment to effect, and pay the defendant all such damages as he may sustain from the wrongful or vexatious suing out the attachment.

A non-resident of this State may sue out an attachment against a non-resident for an existing debt, or ascertained liability; but the plaintiff, his agent or attorney, must, in addition to the oath in other cases, swear that, according to the best of his knowledge, information, and belief, the defendant has not sufficient property within the State of his residence, wherefrom to satisfy the debt; and must also give bond as in other cases, with surety resident in this State.[1]

ARKANSAS.

The plaintiff in a civil action may, at or after the commencement thereof, have an attachment against the property of the defendant, in the cases and upon the grounds hereinafter stated.

I. In an action for the recovery of money, where the action is against —

1. A defendant who is a foreign corporation, or a non-resident of the State; or,

2. Who has been absent therefrom four months; or,

3. Has departed from this State, with intent to defraud his creditors; or,

4. Has left the county of his residence to avoid the service of a summons; or,

5. So conceals himself that a summons cannot be served upon him; or,

6. Is about to remove or has removed his property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim, or the claim of the defendant's creditors; or,

7. Has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; or,

8. Is about to sell, convey, or otherwise dispose of his property, with such intent.

An attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this State, for any claim other than a debt or demand arising upon contract.

II. An attachment may be issued against the property of a defendant in an action to recover possession of personal property, where it has been ordered to be delivered to the plaintiff, and where the property, or part thereof, has been disposed of, concealed, or removed, so that the order for its delivery cannot be executed by the officer.

An order of attachment is made by the clerk of the court in which the action is brought for the recovery of money, where there is filed in his office an affidavit of the plaintiff, or some one in his behalf, showing —

1. The nature of the plaintiff's claim:

2. That it is just:

3. The amount which the affiant believes the plaintiff ought to recover: and,

4. The existence in the action of some one of the grounds for an attachment above enumerated under the first subdivision, and in the case mentioned in

[1] Code of Alabama, 1886.

the second subdivision, where it is shown by such affidavit, or by the return of the sheriff or other officer upon the order for the delivery of the property claimed, that the facts mentioned in that subdivision exist.

When the return by the proper officer, upon a summons against a defendant, states that he has left the county to avoid the service of the summons, or has concealed himself therein for that purpose, it shall be equivalent to the statement of fact in the affidavit.

An order of attachment cannot be issued until there has been executed in his office, by one or more sufficient sureties of the plaintiff, a bond to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the attachment, if the order is wrongfully obtained.

In an action brought by a creditor against his debtor, the plaintiff may, before his claim is due, have an attachment against the property of the debtor, where —

1. He has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or,

2. Is about to make such fraudulent sale, conveyance, or disposition of his property, with such intent; or,

3. Is about to remove his property, or a material part thereof, out of this State, with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts.[1]

CALIFORNIA.

The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, in the following cases: —

I. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property; or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless.

II. In an action upon a contract, express or implied, against a defendant not residing in this State.

The clerk of the court issues the writ of attachment upon receiving an affidavit by, or on behalf of, the plaintiff, showing —

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness, over and above all legal set-offs and counter-claims), upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this State, and that the payment of the same has not been secured by any mortgage, lien, or pledge upon real or personal property; or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or,

[1] Mansfield's Digest of Statutes of Arkansas, 1884.

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness, as near as may be, over and above all legal set-offs or counter-claims), and that the defendant is a non-resident of the State; and

3. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant.

Before issuing the writ, the clerk shall require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that, if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Under the writ, all descriptions of property may be attached, including rights or shares which the defendant may have in the stock of any corporation or company, and all debts due the defendant; and garnishees may be summoned and charged, not only on account of their own debt to the defendant, but on account of credits in their hands belonging to him.[1]

COLORADO.

The plaintiff, at the time of issuing the summons in an action on contract, express or implied, or at any time afterwards before judgment, may obtain an attachment against the property of the defendant, unless the defendant give good and sufficient security to secure the payment of such judgment.

The plaintiff, his agent or attorney, or some credible person for him, must make affidavit that the defendant is indebted to him ; stating the nature and amount of the indebtedness, as near as may be, and alleging any one or more of the following causes for attachment; viz., —

1. That the defendant is not a resident of this State; or,

2. Is a foreign corporation; or,

3. Is a corporation whose chief office or place of business is out of the State; or,

4. Conceals himself, or stands in defiance of an officer, so that process of law cannot be served upon him; or has for more than four months been absent from the State; or that, for such length of time, his whereabouts has been unknown, and that the indebtedness mentioned in the affidavit has been due during all that period; or,

5. Is about to remove his property or effects, or a material part thereof, out of this State, with intent to defraud or hinder or delay his creditors, or some one or more of them; or,

6. Has fraudulently conveyed or transferred or assigned his property or effects, so as to hinder or delay his creditors, or some one or more of them; or,

7. Has fraudulently concealed or removed or disposed of his property or effects, so as to hinder or delay his creditors, or some one or more of them; or,

[1] Deering's Annotated Codes and Statutes of California, 1885.

8. Is about fraudulently to convey or transfer or assign his property or effects, so as to hinder or delay his creditors; or some one or more of them; or,

9. Is about fraudulently to conceal or remove or dispose of his property or effects, so as to hinder or delay his creditors; or that he has departed, or is about to depart, from this State, with the intention of having his effects removed from this State; or,

10. That the defendant has failed or refused to pay the price or value of any article or thing delivered to him, which he should have paid for on the delivery thereof: or

11. Has failed or refused to pay the price or value of any work or labor done or performed, or for any services rendered by the plaintiff, at the instance of the defendant, and which should have been paid at the completion of such work, or when such services were fully rendered; or,

12. Fraudulently contracted the debt, or fraudulently incurred the liability, respecting which the suit is brought, or by false representations or false pretences, or by any fraudulent conduct, procured money or property of the plaintiff; or,

13. That the action is brought upon an overdue promissory note, bill of exchange, or other written instrument for the direct and unconditional payment of money only, or upon an overdue book account.

Before issuing the writ the plaintiff must file a written undertaking, with sufficient surety, to be approved by the clerk, in a sum not less than double the amount claimed, to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the wrongful suing out of the attachment, not exceeding the sum specified in the undertaking.

Attachment may be obtained on a debt not due in any of the cases above stated, except the first three.

At the time of issuing a writ of attachment, or at any time thereafter, the plaintiff may have a writ of garnishment issued, and thereupon attach the credits, effects, debts, *choses in action*, and other personal property of the defendant in the possession or under the control of any third person, as garnishee, for the security of any judgment the plaintiff may recover in such action against the defendant.[1]

CONNECTICUT.

The mesne process in civil actions in this State is by summons or attachment.

Attachment may be granted, upon all complaints containing a money demand, against the estate of the defendant, both real and personal, and, for want thereof, against his body, in actions at law, when not exempt from imprisonment on the execution in the suit.

If the plaintiff be not an inhabitant of this State, or if it do not appear to the authority signing the process that he is able to pay the costs of the action

[1] Colorado Code of Procedure, 1890.

should judgment be rendered against him, he shall, before such process is signed, enter into a recognizance to the adverse party, with some substantial inhabitant of this State, as surety, or some substantial inhabitant of this State shall enter into a recognizance to the adverse party, that the plaintiff shall prosecute his action to effect, and answer all damages, if he make not his plea good.

Atlachments hold until the suit is discharged or the execution is levied, provided the execution is levied within sixty days after final judgment when personal property is attached, and within four months when real estate is concerned.

Whenever the goods or effects of a defendant are concealed in the hands of his agent or trustee, so that they cannot be found to be attached, or where a debt is due from any person to a defendant, or where any debt, legacy, or distributive share is or may become due to the defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof, at least twelve days before the session of the court to which it is returnable, with such agent, trustee, or debtor of the defendant, or, as the case may be, with the executor, administrator, or trustee of such estate, or at the usual place of abode of such garnishee; and it shall be the duty of the officer serving such writ to leave a copy thereof according to such direction; and, from the time of leaving such copy, all the effects of the defendant in the hands of any such garnishee, and any debt due from such garnishee to the defendant, and any debt, legacy, or distributive share due, or that may become due to him from such executor, administrator, or trustee in insolvency, not exempt from execution, shall be secured in his hands, to pay such judgment as the plaintiff shall recover.

The garnishee so summoned may be required to appear in court, and answer on oath whether he has any goods or effects of the defendant, or is indebted to him.[1]

DELAWARE.

In this State there are domestic attachments and foreign attachments.

Domestic Attachment. A writ of domestic attachment issues against an inhabitant of this State after a return to a summons or capias sued and delivered to the sheriff, ten days before the return thereof, showing that the defendant cannot be found, and proof, satisfactory to the court, of the cause of action; or upon affidavit made by the plaintiff, or some other credible person, that the defendant is justly indebted to the plaintiff in a sum exceeding fifty dollars, and has absconded from the place of his usual abode, or gone out of the State, with intent to defraud his creditors or to elude process, as is believed.

The writ of attachment commands the officer to attach the defendant by all his goods and chattels, rights and credits, lands and tenements, in whose hands or possession soever the same may be found in his bailiwick; and to summon the defendant's garnishees to appear in court to declare what goods, chattels, rights, credits, moneys, or effects they have in their hands.

[1] General Statutes of Connecticut, Revision of 1887.

The attachment is dissolved by the defendant's appearing and putting in special bail, at any time before judgment.

On the return of the writ, the court appoints three persons to audit the claims of the defendant's creditors, and to adjust and ascertain all their demands, including that of the attachment plaintiff. These auditors give public notice to the defendant's creditors of the time and place of their meetings; and they investigate any claims presented, in any form they judge best, and may examine any creditor upon oath.

On the receipt of the proceeds of sale of the property attached, the auditors calculate and settle the proportions and dividends due the several creditors, allowing to the creditor attaching and prosecuting the same to judgment a double share, or dividend, if such shall not exceed his debt.

Creditors failing to present their claims to the auditors, or to make proof thereof, are debarred from receiving any share or dividend in the distribution to be made by the auditors; and, before any creditor shall receive any dividend, he must enter into recognizance, with surety, to secure the repayment of the same, if the debtor shall, within one year thereafter, appear in the court, and disprove or avoid the debt upon which the dividend is paid.

Foreign Attachment. A writ of foreign attachment issues against any corporation, aggregate or sole, not created by, or existing under, the laws of this State, upon affidavit made by the plaintiff, or any other credible person, that the defendant is a corporation not created by or existing under the laws of this State, and is justly indebted to the plaintiff in a sum of money, to be specified in the affidavit, and which shall exceed fifty dollars. And such writ also issues against any person not an inhabitant of this State, after a return to a summons or capias issued and delivered to the sheriff, ten days before the return thereof, showing that the defendant cannot be found, and proof, satisfactory to the court, of the cause of action; or upon affidavit made by the plaintiff, or some other credible person, that the defendant resides out of the State, and is justly indebted to the plaintiff in a sum exceeding fifty dollars.

The writ of foreign attachment is framed, directed, executed, and returned, and the like proceedings had, as in the case of a domestic attachment, except as to the appointment of auditors and distribution among creditors: for the plaintiff in foreign attachment has the benefit of his own discovery; and, after judgment, may proceed by order of sale, *fieri facias, capias ad satisfaciendum,* or otherwise, as on other judgments; but, before receiving any sum under such judgment, he must enter into recognizance, with surety, to secure the repayment of the same, as above stated in the case of a domestic attachment.[1]

FLORIDA.

To obtain an attachment in this State, where the debt or demand is due, the party applying for the same, or his agent or attorney, must make oath in writing, that the amount of the debt or sum demanded is actually due; and also that he has reason to believe that the party from whom it is due—

[1] Revised Statutes of Delaware of 1852, as amended.

1. Will fraudulently part with his property before judgment can be recovered against him; or,
2. Is actually removing his property out of the State; or,
3. Is about to remove it out of the State; or,
4. Resides beyond the limits of the State; or,
5. Is actually removing or about to remove out of the State; or,
6. Absconds or conceals himself; or,
7. Is secreting his property, or is fraudulently disposing of the same; or
8. Is actually removing or about to remove beyond the Judicial Circuit in which he resides.

An attachment may be obtained on a debt or demand not due, but which is to become due within nine months from the time of applying for the writ, if the defendant —

1. Is actually removing his property beyond the limits of the State; or,
2. Is fraudulently disposing of or secreting the same for the purpose of avoiding the payment of his just debts or demands.

To obtain the writ on a debt not due, the plaintiff, or his agent or attorney, must first make oath in writing that the amount of the debt or demand claimed and charged against the defendant is actually an existing debt or demand; stating also the time when the debt or demand will actually become due and payable; and also that the defendant is actually removing his property beyond the limits of the State, or is fraudulently disposing or secreting the same for the purpose of avoiding the payment of his just debt; satisfactory proof of which shall be demanded and produced to the officer granting the attachment.

No attachment shall issue until the plaintiff, by himself or by his agent or attorney, shall enter into bond with at least two good and sufficient securities, payable to the defendant, in at least double the debt or sum demanded, conditioned to pay all costs and damages the defendant may sustain in consequence of improperly suing out the attachment.

Under the writ of attachment garnishees may be summoned, and required to answer an oath.[1]

GEORGIA.

Attachments may issue upon money demands, whether arising *ex contractu* or *ex delicto*, in the following cases: —

1. When the debtor resides out of the State; or,
2. Is actually removing or about to remove without the limits of the county; or,
3. Absconds; or,
4. Conceals himself; or,
5. Resists a legal arrest; or,
6. Is causing his property to be removed beyond the limits of the State.

Affidavit must be made by the plaintiff, his agent or attorney at law, that the debtor has placed himself in some one of the positions enumerated, and also of the amount of the debt claimed to be due; and the plaintiff must also give bond, with security, in an amount at least double the debt sworn to,

[1] McClellan's Digest of Laws of Florida, 1881.

conditioned to pay the defendant all damages that he may sustain, and also all costs that may be incurred by him in consequence of suing out the attachment, in the event the plaintiff shall fail to recover in the case.

Affidavit having been made and bond given in any case specified above, the officer *must* issue the writ; but in cases next to be mentioned it is otherwise.

Whenever a debtor has sold or conveyed or concealed his property liable for the payment of his debts, for the purpose of avoiding the payment of the same; or whenever a debtor shall threaten or prepare so to do, — his creditor may petition the judge of the Superior Court of the circuit where the debtor resides, if qualified to act, and, if not, the judge of any adjoining circuit; fully and distinctly stating his grounds of complaint against the debtor, and praying for an attachment against the debtor's property, supporting his petition by affidavit, or by testimony if he can control it. The judge may then grant an attachment; or he may, if he deem it more proper under the circumstances of the case as presented to him, before granting the attachment, appoint a day on which he shall hear the petitioner, and the party against whom the attachment is prayed (providing in his order for due notice to said party), as to the propriety of granting the attachment. And, if satisfied upon such hearing that the attachment should not issue, he shall not grant it; but, if satisfied that the same should issue, he shall grant it.

When a debtor sells or conveys or conceals his property liable for the payment of his debts, for the purpose of avoiding the payment of the same; or whenever a debtor shall threaten or prepare to do so; his creditors may petition the judge of the Superior Court, fully and distinctly stating his grounds of complaint against the debtor, and praying for an attachment against the property of the debtor; supporting his petition by affidavit, or testimony, if he can control the same.

When the debt is not due, the debtor is subject to attachment in the same manner and to the same extent as in cases where the debt is due; except that, where the debt does not become due before final judgment, execution upon the judgment shall be stayed until the debt is due.

An attachment may issue in behalf of a creditor against a debtor, where the debt is for property purchased by the latter from the former, and not paid for, and where the debt has become due, and the property is in the possession of the debtor.

To obtain an attachment in such case, the creditor, his agent, or attorney at law, must make affidavit, before some person authorized by law to issue attachments, that the debtor has placed himself in the position mentioned in this act, and also stating the amount claimed to be due, and also describing the property for which the debt was created.

Bond must be given as in other cases of attachment.

The attachment issued under this act can be levied *only on the property described in the affidavit.*[1]

IDAHO.

The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached as security for the satisfac-

[1] Code of Georgia, 1882.

tion of any judgment that may be recovered, unless the defendant give security to pay such judgment, in the following cases: —

1. In an action upon a judgment, or upon contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property; or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless.

2. In an action upon a judgment, or upon contract, express or implied, against a defendant not residing in this State.

The clerk of the court issues the writ, upon affidavit and undertaking being filed, by or on behalf of the plaintiff.

The affidavit must show, —

1. That the defendant is indebted to the plaintiff, specifying the amount of such indebtedness over and above all legal set-offs or counter-claims, upon a judgment, or upon a contract for the direct payment of money, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if so originally secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless.

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter-claims), and that the defendant is a non-resident of the State; and,

3. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant.

The undertaking on the part of the plaintiff is in a sum not less than two hundred dollars, nor exceeding the amount claimed by him, with sufficient sureties, to the effect that, if the defendant recover judgment, or if the attachment is wrongfully issued, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Real and personal property, stocks or shares, or interest in stock and shares, of any corporation or company, and credits, may be attached, and garnishees may be summoned.[1]

ILLINOIS.

In any court of record having competent jurisdiction, a creditor may have an attachment against the property of his debtor, when the indebtedness exceeds twenty dollars, in any one of the following cases: —

1. Where the debtor is not a resident of this State; or,

2. Conceals himself, or stands in defiance of an officer, so that process cannot be served upon him; or,

3. Has departed from this State with the intention of having his effects removed from this State; or,

4. Is about to depart from this State with the intention of having his effects removed from this State; or,

5. Is about to remove his property from this State, to the injury of such creditor; or,

[1] Revised Statutes of Idaho, 1887.

6. Has, within two years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors; or,

7. Has, within two years prior to the filing of such affidavit, fraudulently concealed or disposed of his property, so as to hinder or delay his creditors; or,

8. Is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors; or,

9. Where the debt sued for was fraudulently contracted on the part of the debtor: *Provided*, the statements of the debtor, his agent or attorney, which constitute a fraud, shall have been reduced to writing, and his signature attached thereto by himself, agent, or attorney.

To obtain an attachment, the plaintiff, his agent or attorney, must make and file with the clerk of the court an affidavit, setting forth the nature and amount of the indebtedness, after allowing all just credits and set-offs, and any one or more of the foregoing causes, and also stating the place of residence of the defendant, if known, and, if not known, that upon diligent inquiry the affiant has not been able to ascertain the same.

Before issuing the attachment, the clerk shall take bond and sufficient security, payable to the defendant, in double the sum sworn to be due, conditioned for satisfying all costs which may be awarded to the defendant, or to any others interested in the proceedings, and all damages and costs which shall be recovered against the plaintiff for wrongfully suing out the attachment.

Lands, tenements, goods, chattels, rights, credits, moneys, and effects of the debtor, and lands and tenements in and to which the debtor has or may claim any equitable interest or title, may be attached.

When the officer is unable to find property of the defendant sufficient to satisfy the attachment, he shall summon the persons mentioned in the writ as garnishees, and all other persons whom the plaintiff shall designate as having any property, effects, *choses in action*, or credits in their possession or power, belonging to the defendant, or who are in any wise indebted to the defendant.[1]

INDIANA.

The plaintiff, at the time of filing his complaint, or at any time afterwards, may have an attachment against the property of the defendant in the cases and in the manner following: —

Where the action is for the recovery of money.

1. Where the defendant, or one of several defendants, is a foreign corporation, or non-resident of this State; or,

2. Is secretly leaving or has left the State, with intent to defraud his creditors: or,

3. So conceals himself that a summons cannot be served upon him; or,

4. Is removing or about to remove his property subject to execution, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim; or,

[1] Hurd's Revised Statutes of Illinois, 1889.

5. Has sold, conveyed, or otherwise disposed of his property subject to execution, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; or,

6. Is about to sell, convey, or otherwise dispose of his property subject to execution, with such intent.

On any of the second, fourth, fifth, and sixth grounds of attachment the writ may issue on a course of action not due.

No attachment, except for the causes mentioned in the fourth, fifth, and sixth clauses, shall issue against any debtor while his wife and family remain settled within the county where he usually resided prior to his absence, if he shall not continue absent from the State more than one year after he shall have absented himself, unless an attempt be made to conceal his absence.

If the wife or family of the debtor shall refuse or are unable to give an account of the cause of his absence, or of the place where he may be found, or give a false account of either, such refusal, inability, or false account shall be deemed an attempt to conceal his absence.

The plaintiff, or some person in his behalf, must make an affidavit showing, —

1. The nature of the plaintiff's claim;
2. That it is just;
3. The amount which he believes the plaintiff ought to recover;
4. That there exists in the action some one of the grounds for an attachment above enumerated.

The plaintiff, or some one in his behalf, must execute a written undertaking, with sufficient surety, to be approved by the clerk, payable to the defendant, to the effect that the plaintiff will duly prosecute his proceeding in attachment, and will pay all damages which may be sustained by the defendant, if the proceedings of the plaintiff shall be wrongful and oppressive.

Upon the filing of such affidavit and written undertaking, in the office of the clerk, he issues an order of attachment to the sheriff, which binds the defendant's property in the county, and becomes a lien thereon, from the time of its delivery to the sheriff, in the same manner as an execution.

If when an order of attachment issues, or at any time before or afterwards, the plaintiff, or other person in his behalf, shall file with the clerk an affidavit that he has good reason to believe that any named person has property of the defendant of any description in his possession, or under his control, which the sheriff cannot attach by virtue of such order; or that such person is indebted to the defendant, or has the control or agency of any property, moneys, credits, or effects; or that the defendant has any shares or interest in the stock of any association or corporation; the clerk shall issue a summons notifying such person, corporation, or association to appear and answer as garnishee in the action.

Any creditor of the defendant, upon filing his affidavit and written undertaking, as required of the attaching creditor, may, at any time before the final adjustment of the suit, become a party to the action, file his complaint, and prove his claim or demand against the defendant, and may have any person summoned as garnishee or held to bail who has not before been summoned or held to bail.

The money realized from the attachment and the garnishees shall, under the direction of the court, be paid to the several creditors, in proportion to the amount of their several claims as adjusted.[1]

IOWA.

In a civil action, the plaintiff may cause any property of the defendant which is not exempt from execution to be attached at the commencement, or during the progress, of the proceedings.

The grounds for obtaining the attachment are embodied in the petition, setting forth the cause of action, which must be sworn to, and must state, as the affiant verily believes, —

1. That the defendant is a foreign corporation, or acting as such; or,
2. Is a non-resident of the State; or,
3. Is about to remove his property out of the State, without leaving sufficient remaining for the payment of his debts; or,
4. Has disposed of his property, in whole or in part, with intent to defraud his creditors; or,
5. Is about to dispose of his property with intent to defraud his creditors; or,
6. Has absconded, so that the ordinary process cannot be served upon him; or,
7. Is about to remove permanently out of the county, and has property therein not exempt from execution, and that he refuses to pay or secure the plaintiff; or,
8. Is about to remove permanently out of the State, and refuses to pay or secure the debt due the plaintiff; or,
9. Is about to remove his property, or a part thereof, out of the county, with intent to defraud his creditors; or,
10. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,
11. Has property or rights in action which he conceals; or,
12. That the debt is due for property obtained under false pretences.

If the plaintiff's demand is founded on contract, the petition must state that something is due, and as nearly as practicable the amount.

If the demand is not founded on contract, the petition must be presented to some judge of the supreme, district, or circuit court, who shall make an allowance thereon of the amount in value of the property that may be attached.

Property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, and when the petition, in addition to that fact, states that the defendant is about to dispose of his property with intent to defraud his creditors; or that he is about to remove or has removed from the State, and refuses to make any arrangements for securing the payment of the debt when it falls due, and which removal or contemplated removal was not known to the plaintiff at

[1] Annotated Indiana Practice Code, 1888.

the time the debt was contracted; or that the defendant has disposed of his property, in whole or in part, with intent to defraud his creditors; or that the debt was incurred for property obtained under false pretences.

Before a writ can be issued, the plaintiff must file with the clerk a bond, for the use of the defendant, with sureties to be approved by the clerk, in a penalty at least double the value of the property sought to be attached, and in no case less than two hundred and fifty dollars in a court of record, nor less than fifty dollars if in a justice's court, conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment. In an action on such bond, the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained and reasonable attorney's fees to be allowed by the court; and, if it be shown that the attachment was sued out maliciously, he may recover exemplary damages; nor need he wait until the principal suit is determined before suing on the bond.

Debts due the defendant, or property of his held by third persons and which cannot be found, or the title to which is doubtful, are attached by garnishment.[1]

KANSAS.

The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, upon the following grounds:—

1. When the defendant is a foreign corporation, or a non-resident of this State; but no order of attachment shall be issued on these grounds, or either of them, for any claim other than a debt or demand arising upon contract, judgment, or decree, unless the cause of action arose wholly within the limits of this State, which fact must be established on the trial.

2. When the defendant has absconded, with the intention to defraud his creditors; or,

3. Has left the county of his residence to avoid the service of a summons; or,

4. So conceals himself that a summons cannot be served upon him; or,

5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or,

6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

7. Has property, or rights in action, which he conceals; or,

8. Has assigned, removed, or disposed of, or is about to dispose of, his property, or part thereof, with the intent to defraud, hinder, or delay his creditors; or,

9. Fraudulently contracted the debt, or fraudulently incurred the liability or obligation, for which suit is about to be or has been brought; or,

10 Where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeamor, or the seduction of any female; or,

[1] McClain's Annotated Statutes of Iowa, 1888.

11. When the debtor has failed to pay the price or value of any article or thing delivered, which, by contract, he was bound to pay upon delivery.

An order of attachment is made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit and an undertaking.

The affidavit must be made by the plaintiff, his agent or attorney, and show, —

1. The nature of the plaintiff's claim;
2. That it is just;
3. The amount which the affiant believes the plaintiff ought to recover; and,
4. The existence of some one of the above grounds for an attachment.

The undertaking must be executed by one or more sufficient sureties of the plaintiff, to be approved by the clerk, in a sum not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained; but no undertaking is required where the defendant is a non-resident of the State or a foreign corporation.

Under the order of attachment, the officer may attach lands, tenements, goods, chattels, stocks, rights, credits, moneys, and effects.

Garnishees may be summoned, upon the plaintiff, his agent or attorney, making oath, in writing, that he has good reason to believe, and does believe, that any person or corporation, to be named, has property of the defendant (describing the same) in his possession, or is indebted to him; and the garnishee stands liable, from the time of service of notice upon him, to the plaintiff, for all property, moneys, and credits in his hands, or due from him to the defendant.

The court or judge, in vacation, may appoint a receiver, who shall take possession of all notes, due-bills, books of account, accounts, and all other evidences of debt that have been taken by the officer, and proceed to settle and collect the same.

When a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent; or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts, — a creditor may bring an action on his claim before it is due, and have an attachment against the property of the debtor.

In such case the plaintiff, his agent or attorney, must make oath, in writing, showing the nature and amount of the plaintiff's claim, that it is just, when the same will become due, and the existence of some one of the grounds of attachment just mentioned as applicable to this particular case; and then an attachment may be granted by the court in which the action is brought, or by a judge thereof.[1]

[1] General Statutes of Kansas, 1889.

KENTUCKY.

The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, in the cases and upon the grounds hereinafter stated, as a security for the satisfaction of such judgment as may be recovered: —

I. In an action for the recovery of money where the action is against, —

1. A defendant who is a foreign corporation, or a non-resident of this State; or,

2. Who has been absent therefrom four months; or,

3. Has departed from this State with intent to defraud his creditors; or,

4. Has left the county of his residence to avoid the service of a summons; or,

5. So conceals himself that a summons cannot be served upon him; or,

6. Is about to remove his property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim, or the claims of defendant's creditors; or,

7. Has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; or,

8. Is about to sell, convey, or otherwise dispose of his property with such intent.

But an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this State, for any claim other than a debt or demand arising upon contract, express or implied, or a judgment or award.

II. In an action for the recovery of money due upon a contract, judgment, or award, if the defendant have no property in this State subject to execution, or not enough to satisfy the plaintiff's demand, and the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found.

III. In an action to recover the possession of personal property, which has been ordered to be delivered to the plaintiff, and which property, or part thereof, has been disposed of, concealed, or removed, so that the order for its delivery cannot be executed by the sheriff.

An order of attachment is made by the clerk of the court in which the action is brought, in any case mentioned under the first and second heads, upon an affidavit of the plaintiff being filed, showing, —

1. The nature of the plaintiff's claim;

2. That it is just;

3. The sum which the affiant believes the plaintiff ought to recover; and,

4. The existence in the action of some one of the grounds for an attachment above enumerated under the first and second heads; and in the case mentioned under the third head, where it is shown by such affidavit, or by the return of the sheriff upon the order for the delivery of the property claimed, and the facts mentioned under that head exist.

When the return by the proper officer upon a summons against a defendant states that he has left the county to avoid the service of the summons, or has

concealed himself therein for that purpose, it is equivalent to the statement of the fact in an affidavit.

The order of attachment shall not be issued until there has been executed in the clerk's office, by one or more sufficient sureties of the plaintiff, a bond to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the attachment, if the order is wrongfully obtained, not exceeding double the amount of the plaintiff's claim.

An order of attachment binds the defendant's property in the county which might be seized under an execution against him, from the time of the delivery of the order to the sheriff, in the same manner as an execution would bind it; and the lien of the plaintiff is completed upon any property or demand of the defendant, by executing the order upon it in the manner directed by law.

A garnishee may be summoned, and is required to answer on oath. Failing so to answer, the plaintiff may bring suit against him, and in that suit may take an attachment against him on any of the grounds above stated.[1]

LOUISIANA.

The process of attachment in this State belongs to the class of proceedings known in the Code of Practice as Conservatory Acts which may accompany the demand.

An attachment in the hands of third persons is a mandate which a creditor obtains from a competent judge, or a clerk of a court, commanding the seizure of any property, credit, or right belonging to his debtor, in whatever hands it may be found, to satisfy the demand which he intends to bring against him.

A creditor may obtain such attachment of the property of his debtor, in the following cases:—

1. When the debtor is about leaving permanently the State, without there being a possibility, in the ordinary course of judicial proceedings, of obtaining or executing judgment against him previous to his departure, or when the debtor has already left the State permanently; or,

2. Resides out of the State; or,

3. Conceals himself to avoid being cited and forced to answer to the suit intended to be brought against him.

A creditor may, in the like manner, obtain a mandate of seizure against all species of property belonging to his debtor, real or personal, whether it consists of credits, or rights of action, and whether it be in the debtor's possession, or in that of third persons, by whatever title the same be held, either as deposit or placed under their custody.

The property of a debtor may be attached in the hands of third persons by his creditor, in order to secure the payment of a debt, whatever may be its nature, whether the amount be liquidated or not, provided the term of payment have arrived, and the creditor, his agent or attorney in fact, who prays for the attachment, state expressly and positively the amount which he claims.

Where the debt or obligation is not yet due, any judge of competent jurisdiction may order a writ of attachment to issue whenever he shall be satisfied

[1] Bullitt's Kentucky Code of Practice, 1876.

by the oath of the creditor or his agent of the existence of the debt, and upon the creditor or his agent swearing that the debtor is about to remove his property out of the State before the debt becomes due.

A creditor wishing to have the property of his debtor attached, must demand it in a petition presented to a competent judge, with a declaration made under oath of the existence of the debt demanded, and that he verily believes that the debtor has left the State permanently, or that he resides out of the State, or conceals himself, so that citation cannot be served on him. In the absence of the creditor, the oath may be made by the agent or attorney in fact of the creditor to the best of his knowledge and belief.

The creditor, his agent or attorney in fact, praying such attachment, must, besides, annex to his petition his obligation in favor of the defendant, for a sum exceeding by one-half that which he claims, with the surety of one good and solvent person, residing within the jurisdiction of the court to which the petition is presented, as a security for the payment of such damages as the defendant may recover against him in case it should be decided that the attachment was wrongfully obtained.

If a creditor know or suspect that a third person has in his possession property belonging to his debtor, or that he is indebted to the debtor, he may make such person a party to the suit, by having him cited to declare on oath what property belonging to the defendant he has in his possession, or in what sum he is indebted to the defendant, even when the term of payment has not yet arrived. The person thus made a party to the suit is termed the garnishee; and he is required to answer categorically under oath interrogatories propounded to him by the plaintiff.[1]

MAINE.

All civil actions, except *scire facias* and other special writs, shall be commenced by original writs; which may be framed to attach the goods and estate of the defendant, and for want thereof to take the body, or as an original summons with or without an order to attach goods and estate; and in actions against corporations, and in other cases where goods and estate are attached, and the defendant is not liable to arrest, the writ and summons may be combined in one.

All goods and chattels may be attached and held as security to satisfy the judgment for damages and costs which the plaintiff may recover, except such as, from their nature and situation, have been considered as exempted from attachment according to the principles of the common law as adopted and practised in this State. Shares or interests of a defendant in any incorporated company, and the franchises and right to demand and take toll, and all other property of a corporation, may be attached.

All the debtor's estate, interest, or share in real estate, whether held in tail, reversion, remainder, joint tenancy, or in common, for life, years, or otherwise, including an equity of redemption, may be attached.

All personal actions, except those of detinue, replevin, actions on the case

[1] Fuqua's Louisiana Code of Practice, 1867.

for malicious prosecution, for slander by writing or speaking, or for assault and battery, may be commenced by trustee process [garnishment].

Service of the writ on the trustee binds all goods, effects, or credits of the defendant, intrusted or deposited in his possession, to respond to the final judgment in the action.

Any debt or legacy, due from an executor or administrator, and any goods, effects, and credits in his hands as such, may be attached by trustee process.[1]

MARYLAND.

Every person, and every body corporate that has the right to become a plaintiff in any action or proceeding before any judicial tribunal in this State, shall have the right to become a plaintiff in an attachment against a non-resident of this State, or against a person absconding.

Every person who does not reside in this State, and every person who absconds, and any corporation not chartered by this State, or any corporation chartered by this State but not having the president or a majority of the directors or managers thereof residing in this State, may be made a defendant in attachment.

Every person who shall actually run away, abscond, or fly from justice, or secretly remove himself from his place of abode with intention to evade the payment of his just debts, or to injure or defraud his creditors, shall be considered as having absconded.

An attachment may also be obtained against a debtor,—

1. When he is about to abscond from the State; or,

2. Has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, his property, or some portion of it, with intent to defraud his creditors; or,

3. Fraudulently contracted the debt or incurred the obligation respecting which the action is brought; or,

4. Has removed, or is about to remove, his property, or some portion thereof, out of this State, with intent to defraud his creditors.

To obtain an attachment against a non-resident or an absconding debtor, an affidavit must be made that the debtor is *bona fide* indebted to the plaintiff in a stated sum, over and above all discounts; and that the affiant knows, or is credibly informed and verily believes, that the debtor is not a citizen of this State, and that he doth not reside therein; or if the debtor resides in this State, that he doth know, or is credibly informed and verily believes, that the debtor has absconded.

To obtain an attachment in any of the other cases mentioned, the plaintiff, or some person in his behalf, shall make affidavit before the clerk of the court from which the attachment is to issue, stating that the defendant is *bona fide* indebted to the plaintiff in a named sum, over and above all discounts, and that the plaintiff knows, or has good reason to believe, that one or other of the causes of attachment specified exists; and at the same time the plaintiff, or some person on his behalf, shall deliver to the clerk a bond to the State of

[1] Revised Statutes of Maine, 1883.

Maryland, with security to be approved by the clerk, in double the sum alleged to be due by the defendant, conditioned that the plaintiff shall prosecute his suit with effect, or, in case of failure thereof, shall pay and satisfy the defendant all such costs in the suit and all such damages as shall be awarded against the plaintiff, in any suit which may be brought for wrongfully suing out the attachment.

Every attachment issued without a bond and affidavit taken aforesaid is declared illegal and void, and shall be dismissed.

Any kind of property or credits belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due.

A plaintiff having a judgment or decree in any court of law or equity in this State, may, instead of other execution, issue an attachment against the lands, tenements, goods, chattels, and credits of the defendant, in the plaintiff's own hands, or in the hands of any other person.[1]

MASSACHUSETTS.

Original writs may be framed, either to attach the goods or estate of the defendant, and, for want thereof, to take his body; or they may be an original summons, with or without an order to attach the goods or estate.

All real and personal estate, liable to be taken on execution (except such personal estate as, from its nature or situation, has been considered as exempt according to the principles of the common law as adopted and practised in this State), may be attached upon the original writ, in any action in which debt or damages are recoverable. Shares of stock in corporations may be attached, as may personal property of the defendant subject to a mortgage, pledge, or lien, of which the defendant has the right of redemption; provided the attaching creditor pays or tenders to the mortgagee, pawnee, or holder of the property, the amount for which it is liable within ten days after the same is demanded.

All personal actions may be commenced by trustee process [garnishment], except actions of replevin, actions for tort for malicious prosecution, for slander either by writing or speaking, and for assault and battery; and any person or corporation may be summoned as trustee [garnishee] of the defendant.

Debts, legacies, goods, effects, or credits, due from, or in the hands of, an executor or administrator as such, may be attached in his hands.[2]

MICHIGAN.

Any creditor may proceed by attachment against his debtor in the circuit court of the county in which the creditor or the debtor (or in case of joint debtors, either of them) shall reside, if the debtor have property subject to at-

[1] Revised Code of Maryland, 1878.

[2] Public Statutes of Massachusetts, 1882.

tachment in said county; and in case the debtor has no property in said county, or is a non-resident of this State, then in the circuit court of any county where the property of the debtor may be found.

Before any writ of attachment shall be executed, the plaintiff, or some person in his behalf, must make and annex thereto an affidavit, stating that the defendant is indebted to the plaintiff, and specifying the amount of such indebtedness as near as may be, over and above all legal set-offs, and that the same is due upon contract, express or implied, or upon judgment, and containing a further statement that the deponent knows or has good reason to believe, either, —

1. That the defendant has absconded, or is about to abscond, from this State, or that he is concealed therein, to the injury of his creditors; or,

2. Has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property, with intent to defraud his creditors; or,

3. Has removed or is about to remove any of his property out of this State, with intent to defraud his creditors; or,

4. Fraudulently contracted the debt or incurred the obligation respecting which the suit is brought; or,

5. Is not a resident of this State, and has not resided therein for three months immediately preceding the time of making the affidavit; or,

6. Is a foreign corporation.

The affidavit shall not be deemed insufficient by reason of the intervention of a day between the date of the *jurat* thereto and the issuing of the writ; and when the person making the affidavit resides in any other county in this State than that in which the writ of attachment is to issue, one day's time for every thirty miles of travel, by the usual post route, from the residence of such person to the place from which the writ shall issue, shall be allowed between the date of such *jurat* and the issuing of the writ.

The writ is executed upon real property, goods, chattels, moneys, and effects of the defendant; but no authority exists for summoning garnishees under it.

In all personal actions arising upon contract, brought in a circuit court, or in a municipal court of civil jurisdiction, whether commenced by declaration, writs of capias, summons, or attachment, if the plaintiff, his agent or attorney, shall file with the clerk of the court, at the time of or after commencement of suit, an affidavit stating that he has good reason to believe, and does believe, that any person (naming him) has property, money, goods, chattels, credits, and effects in his hands, or under his custody or control, belonging to the defendant, or that such person is indebted to the defendant, whether such indebtedness be due or not; that the defendant is justly indebted to the plaintiff in a given amount, over and above all legal set-offs, and that the affiant is justly apprehensive of the loss of the same, unless a writ of garnishment issue to the person named, — a copy of the writ or declaration and affidavit shall be attached to a writ of garnishment, to be issued by the clerk, and personally served in the same manner as a writ of summons; and from the time of such service the garnishee is held liable as such.[1]

[1] Howell's Annotated Statutes of Michigan, 1882.

Maryland, with security to be approved by the clerk, in double the sum alleged to be due by the defendant, conditioned that the plaintiff shall prosecute his suit with effect, or, in case of failure thereof, shall pay and satisfy the defendant all such costs in the suit and all such damages as shall be awarded against the plaintiff, in any suit which may be brought for wrongfully suing out the attachment.

Every attachment issued without a bond and affidavit taken aforesaid is declared illegal and void, and shall be dismissed.

Any kind of property or credits belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due.

A plaintiff having a judgment or decree in any court of law or equity in this State, may, instead of other execution, issue an attachment against the lands, tenements, goods, chattels, and credits of the defendant, in the plaintiff's own hands, or in the hands of any other person.[1]

MASSACHUSETTS.

Original writs may be framed, either to attach the goods or estate of the defendant, and, for want thereof, to take his body; or they may be an original summons, with or without an order to attach the goods or estate.

All real and personal estate, liable to be taken on execution (except such personal estate as, from its nature or situation, has been considered as exempt according to the principles of the common law as adopted and practised in this State), may be attached upon the original writ, in any action in which debt or damages are recoverable. Shares of stock in corporations may be attached, as may personal property of the defendant subject to a mortgage, pledge, or lien, of which the defendant has the right of redemption; provided the attaching creditor pays or tenders to the mortgagee, pawnee, or holder of the property, the amount for which it is liable within ten days after the same is demanded.

All personal actions may be commenced by trustee process [garnishment], except actions of replevin, actions for tort for malicious prosecution, for slander either by writing or speaking, and for assault and battery; and any person or corporation may be summoned as trustee [garnishee] of the defendant.

Debts, legacies, goods, effects, or credits, due from, or in the hands of, an executor or administrator as such, may be attached in his hands.[2]

MICHIGAN.

Any creditor may proceed by attachment against his debtor in the circuit court of the county in which the creditor or the debtor (or in case of joint debtors, either of them) shall reside, if the debtor have property subject to at-

[1] Revised Code of Maryland, 1878.

[2] Public Statutes of Massachusetts, 1882.

tachment in said county; and in case the debtor has no property in said county, or is a non-resident of this State, then in the circuit court of any county where the property of the debtor may be found.

Before any writ of attachment shall be executed, the plaintiff, or some person in his behalf, must make and annex thereto an affidavit, stating that the defendant is indebted to the plaintiff, and specifying the amount of such indebtedness as near as may be, over and above all legal set-offs, and that the same is due upon contract, express or implied, or upon judgment, and containing a further statement that the deponent knows or has good reason to believe, either, —

1. That the defendant has absconded, or is about to abscond, from this State, or that he is concealed therein, to the injury of his creditors; or,

2. Has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property, with intent to defraud his creditors; or,

3. Has removed or is about to remove any of his property out of this State, with intent to defraud his creditors; or,

4. Fraudulently contracted the debt or incurred the obligation respecting which the suit is brought; or,

5. Is not a resident of this State, and has not resided therein for three months immediately preceding the time of making the affidavit; or,

6. Is a foreign corporation.

The affidavit shall not be deemed insufficient by reason of the intervention of a day between the date of the *jurat* thereto and the issuing of the writ; and when the person making the affidavit resides in any other county in this State than that in which the writ of attachment is to issue, one day's time for every thirty miles of travel, by the usual post route, from the residence of such person to the place from which the writ shall issue, shall be allowed between the date of such *jurat* and the issuing of the writ.

The writ is executed upon real property, goods, chattels, moneys, and effects of the defendant; but no authority exists for summoning garnishees under it.

In all personal actions arising upon contract, brought in a circuit court, or in a municipal court of civil jurisdiction, whether commenced by declaration, writs of capias, summons, or attachment, if the plaintiff, his agent or attorney, shall file with the clerk of the court, at the time of or after commencement of suit, an affidavit stating that he has good reason to believe, and does believe, that any person (naming him) has property, money, goods, chattels, credits, and effects in his hands, or under his custody or control, belonging to the defendant, or that such person is indebted to the defendant, whether such indebtedness be due or not; that the defendant is justly indebted to the plaintiff in a given amount, over and above all legal set-offs, and that the affiant is justly apprehensive of the loss of the same, unless a writ of garnishment issue to the person named, — a copy of the writ or declaration and affidavit shall be attached to a writ of garnishment, to be issued by the clerk, and personally served in the same manner as a writ of summons; and from the time of such service the garnishee is held liable as such.[1]

[1] Howell's Annotated Statutes of Michigan, 1882.

Maryland, with security to be approved by the clerk, in double the sum alleged to be due by the defendant, conditioned that the plaintiff shall prosecute his suit with effect, or, in case of failure thereof, shall pay and satisfy the defendant all such costs in the suit and all such damages as shall be awarded against the plaintiff, in any suit which may be brought for wrongfully suing out the attachment.

Every attachment issued without a bond and affidavit taken aforesaid is declared illegal and void, and shall be dismissed.

Any kind of property or credits belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due.

A plaintiff having a judgment or decree in any court of law or equity in this State, may, instead of other execution, issue an attachment against the lands, tenements, goods, chattels, and credits of the defendant, in the plaintiff's own hands, or in the hands of any other person.[1]

MASSACHUSETTS.

Original writs may be framed, either to attach the goods or estate of the defendant, and, for want thereof, to take his body; or they may be an original summons, with or without an order to attach the goods or estate.

All real and personal estate, liable to be taken on execution (except such personal estate as, from its nature or situation, has been considered as exempt according to the principles of the common law as adopted and practised in this State), may be attached upon the original writ, in any action in which debt or damages are recoverable. Shares of stock in corporations may be attached, as may personal property of the defendant subject to a mortgage, pledge, or lien, of which the defendant has the right of redemption; provided the attaching creditor pays or tenders to the mortgagee, pawnee, or holder of the property, the amount for which it is liable within ten days after the same is demanded.

All personal actions may be commenced by trustee process [garnishment], except actions of replevin, actions for tort for malicious prosecution, for slander either by writing or speaking, and for assault and battery; and any person or corporation may be summoned as trustee [garnishee] of the defendant.

Debts, legacies, goods, effects, or credits, due from, or in the hands of, an executor or administrator as such, may be attached in his hands.[2]

MICHIGAN.

Any creditor may proceed by attachment against his debtor in the circuit court of the county in which the creditor or the debtor (or in case of joint debtors, either of them) shall reside, if the debtor have property subject to at-

[1] Revised Code of Maryland, 1878.

[2] Public Statutes of Massachusetts, 1882.

tachment in said county; and in case the debtor has no property in said county, or is a non-resident of this State, then in the circuit court of any county where the property of the debtor may be found.

Before any writ of attachment shall be executed, the plaintiff, or some person in his behalf, must make and annex thereto an affidavit, stating that the defendant is indebted to the plaintiff, and specifying the amount of such indebtedness as near as may be, over and above all legal set-offs, and that the same is due upon contract, express or implied, or upon judgment, and containing a further statement that the deponent knows or has good reason to believe, either, —

1. That the defendant has absconded, or is about to abscond, from this State, or that he is concealed therein, to the injury of his creditors; or,

2. Has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property, with intent to defraud his creditors; or,

3. Has removed or is about to remove any of his property out of this State, with intent to defraud his creditors; or,

4. Fraudulently contracted the debt or incurred the obligation respecting which the suit is brought; or,

5. Is not a resident of this State, and has not resided therein for three months immediately preceding the time of making the affidavit; or,

6. Is a foreign corporation.

The affidavit shall not be deemed insufficient by reason of the intervention of a day between the date of the *jurat* thereto and the issuing of the writ; and when the person making the affidavit resides in any other county in this State than that in which the writ of attachment is to issue, one day's time for every thirty miles of travel, by the usual post route, from the residence of such person to the place from which the writ shall issue, shall be allowed between the date of such *jurat* and the issuing of the writ.

The writ is executed upon real property, goods, chattels, moneys, and effects of the defendant; but no authority exists for summoning garnishees under it.

In all personal actions arising upon contract, brought in a circuit court, or in a municipal court of civil jurisdiction, whether commenced by declaration, writs of capias, summons, or attachment, if the plaintiff, his agent or attorney, shall file with the clerk of the court, at the time of or after commencement of suit, an affidavit stating that he has good reason to believe, and does believe, that any person (naming him) has property, money, goods, chattels, credits, and effects in his hands, or under his custody or control, belonging to the defendant, or that such person is indebted to the defendant, whether such indebtedness be due or not; that the defendant is justly indebted to the plaintiff in a given amount, over and above all legal set-offs, and that the affiant is justly apprehensive of the loss of the same, unless a writ of garnishment issue to the person named, — a copy of the writ or declaration and affidavit shall be attached to a writ of garnishment, to be issued by the clerk, and personally served in the same manner as a writ of summons; and from the time of such service the garnishee is held liable as such.[1]

[1] Howell's Annotated Statutes of Michigan, 1882.

MINNESOTA.

In an action for the recovery of money (except for libel, slander, seduction, breach of promise of marriage, false imprisonment, or assault and battery,) the plaintiff at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, in the manner hereinafter prescribed, as security for the satisfaction of such judgment as the plaintiff may recover.

The writ of attachment is issued whenever it appears by affidavit of the plaintiff, his agent or attorney, that a cause of action exists against the defendant, specifying the amount of the claim and the ground thereof, and that the defendant is either —

1. A foreign corporation; or,
2. Is not a resident of this State; or,
3. Has departed therefrom with the intent to defraud or delay his creditors, or to avoid the service of a summons; or,
4. Keeps himself concealed therein with like intent; or,
5. Has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, his property, with intent to delay or defraud his creditors; or,
6. That the debt was fraudulently contracted.

Before issuing the writ, the plaintiff must give a bond, with sufficient sureties, conditioned that, if the defendant recover judgment, or if the writ shall be set aside or vacated, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the penalty of the bond, which shall be at least two hundred and fifty dollars.

All property, real, personal, and mixed, including all rights and shares in the stock of any corporation, all money, bills, notes, book accounts, debts, credits, and all other evidences of indebtedness belonging to the defendant, are subject to attachment.

In any action for the recovery of money, if the plaintiff, his agent or attorney, at the time of filing the complaint or issuing the summons therein, or at any time during the pendency of the action, or after judgment therein against the defendant, makes and files with the clerk of the court an affidavit stating that he believes that any person (naming him) has property, money, or effects in his hands or under his control belonging to the defendant in such action, or that such person is indebted to the defendant; and that the value of such property or effects, or the amount of such money or indebtedness, exceeds the sum of twenty-five dollars; a summons may be issued against such person as garnishee, and the service thereof upon the garnishee shall attach and bind all the property, money, or effects in his hands, or under his control, belonging to the defendant, and any and all indebtedness owing by him to the defendant, at the date of such service.

Any debt or legacy due from an executor or administrator, and any other property, money, or effects in the hands of an executor or administrator, may be attached by this process.

Debts may be attached before they are payable; and bills of exchange and promissory notes, whether under or over due, drafts, bonds, certificates of

deposit, bank-notes, money, contracts for the payment of money, and other written evidence of indebtedness, in the hands of the garnishee at the time of the service of the summons, shall be deemed "effects." [1]

MISSISSIPPI.

The remedy by attachment applies to all actions or demands, founded upon any indebtedness, or for the recovery of damages for the breach of any contract, express or implied, and to actions founded upon any penal statute.

An affidavit must be made by the plaintiff, his agent or attorney, of the amount of his debt or demand, to the best of his knowledge and belief, and he shall also make oath to one or more of the following particulars: —

1. That the defendant is a foreign corporation, or a non-resident of this State; or,

2. Has removed, or is about to remove, himself or his property out of this State; or,

3. So absconds, or conceals himself, that he cannot be served with a summons; or,

4. That he contracted the debt or incurred the obligation in conducting the business of a ship, steamboat, or other watercraft in some of the navigable waters of this State; or,

5. Has property or rights in action, which he conceals, and unjustly refuses to apply to the payment of his debts; or,

6. Has assigned or disposed of, or is about to assign or dispose of, his property, or rights in action, or some part thereof, with intent to defraud his creditors; or,

7. Has converted, or is about to convert, his property into money, or evidences of debt, with intent to place it beyond the reach of his creditors; or,

8. Fraudulently contracted the debt or incurred the obligation for which suit has been or is about to be brought.

In addition to the required affidavit, a bond must be executed by the plaintiff, his agent or attorney, with a surety or sureties in double the sum for which the complaint is made, payable to the defendant, and conditioned that the plaintiff shall pay the defendant all such damages as he shall sustain by the wrongful suing out of the attachment, and all costs which may be awarded against the plaintiff in the suit.

The attachment may be levied on lands, tenements, money, goods, chattels, books of account, and evidences of indebtedness, belonging to the defendant, and on the stock, share, or interest which the defendant may have in any copartnership or incorporated company; and garnishees may be summoned.

An attachment may issue for a debt not due, if the creditor make affidavit of any of the three last particulars above specified as grounds for an attachment, or that he has just cause to suspect, and verily believes that the defendant will remove himself, or his effects out of the State, before the debt will become payable, with intent to hinder, delay, or defraud his creditors, or that he has removed, with like intent, leaving property in this State.[2]

[1] General Statutes of Minnesota, 1891.

[2] Revised Code of Mississippi, 1880.

MISSOURI.

The plaintiff in any civil action may have an attachment against the property of the defendant, or that of any one or more of several defendants, in any of the following cases : —

1. Where the defendant is not a resident of this State; or,

2. Is a corporation whose chief office or place of business is out of this State; or,

3. Conceals himself so that the ordinary process of law cannot be served upon him; or,

4. Has absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him; or,

5. Is about to remove his property or effects out of this State, with the intent to defraud, hinder, or delay his creditors; or,

6. Is about to remove out of this State, with the intent to change his domicile; or,

7. Has fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors; or,

8. Has fraudulently concealed, removed, or disposed of his property or effects so as to hinder or delay his creditors; or,

9. Is about fraudulently to convey or assign his property or effects so as to hinder or delay his creditors; or,

10. Is about fraudulently to conceal, remove, or dispose of his property or effects so as to hinder or delay his creditors; or,

11. Where the cause of action accrued out of this State, and the defendant has absconded or secretly removed his property or effects into this State; or,

12. Where the damages, for which the action is brought are for injuries arising from the commission of some felony or misdemeanor or for the seduction of any female; or,

13. Where the debtor has failed to pay the price or value of any article or thing delivered, which by contract he was bound to pay upon the delivery; or,

14. Where the debt sued for was fraudulently contracted on the part of the debtor.

An attachment may issue on a demand not yet due, in any of the foregoing cases, except the first, second, third, and fourth.

In order to obtain an attachment an affidavit must be made by the plaintiff, or some person for him, which shall state that the plaintiff has a just demand against the defendant, and the amount which the affiant believes the plaintiff ought to recover, after allowing all just credits and set-offs, and that he has good reason to believe, and does believe, in the existence of one or more of the causes of attachment above set forth. If the cause be alleged in the language of the statute as above set forth, it is sufficient.

Before the attachment can issue, the plaintiff, or some responsible person, as principal, with one or more securities, resident householders of the county in which the action is brought, must execute a bond in a sum at least double the amount sworn to, payable to the State of Missouri, conditioned that the plaintiff shall prosecute his action without delay, and with effect; refund all

sums of money that may be adjudged to be refunded to the defendant, or found to have been received by the plaintiff, and not justly due to him; and pay all damages and costs that may accrue to any defendant or garnishee, by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon.

This bond may be sued on, at the instance and to the use of the party injured, in the name of the State.

Under an attachment, the officer is authorized to seize as attachable property the defendant's account-books, accounts, notes, bills of exchange, bonds, certificates of deposit, and other evidences of debt, as well as his other property, real, personal, and mixed; and any and all judgment debts of the defendant, as well where the judgment exists in the court issuing the writ as where it exists in any other court within the jurisdiction of the court issuing the writ: but no property or wages declared by statute to be exempt from execution shall be attached, except in the cases of a non-resident defendant, or of a defendant who is about to move out of the State with intent to change his domicile.

All persons shall be summoned as garnishees who are named as such in the writ; and such others as the officers shall find in the possession of goods, money, or effects of the defendant not actually seized by the officer; and debtors of the defendant; and such persons as the plaintiff or his attorney shall direct.[1]

MONTANA.

The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered in the action, unless the defendant give good and sufficient security to secure the payment of such judgment.

The clerk of the court issues the writ of attachment, upon receiving affidavit and undertaking.

The affidavit must be made by the plaintiff, his agent or attorney, showing that the defendant is indebted to the plaintiff upon a contract, express or implied, for the payment of money, gold dust, or other property then due, which is not secured by a mortgage, lien, or pledge upon real or personal property; or, if so secured, that the security has become insufficient by the act of the defendant, or by any means has become nugatory.

Actions may be commenced, and writs of attachment issued, upon any debt for the payment of money or specific property, before the same shall have become due, when it shall appear by the affidavit, in addition to what is above required, either, —

1. That the defendant is leaving or is about to leave this State, taking with him property, money, or other effects which might be subjected to the payment of the debt, for the purpose of defrauding his creditors; or,

2. Is disposing or is about to dispose of his property, subject to execution, for the purpose of defrauding his creditors.

[1] Revised Statutes of Missouri, 1889.

The undertaking must be on the part of the plaintiff, with two or more sufficient sureties, to be approved by the clerk, in a sum not less than double the amount claimed by the plaintiff, to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the attachment, not exceeding the sum specified in the undertaking.

Rights or shares in the stock of any corporation or company, together with the interest and profits thereon, and all debts due the defendant, and all other property of the defendant not exempt from execution, may be attached, and garnishees may be summoned.[1]

NEBRASKA.

The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, upon the following grounds: —

1. When the defendant is a foreign corporation, or a non-resident of this State; or,
2. Has absconded with the intent to defraud his creditors; or,
3. Has left the county of his residence to avoid the service of a summons; or,
4. So conceals himself that a summons cannot be served upon him; or,
5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or,
6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,
7. Has property, or rights of action, which he conceals; or,
8. Has assigned, removed, or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud his creditors; or,
9. Fraudulently contracted the debt or incurred the obligation for which suit is about to be or has been brought.

But an attachment shall not be granted on the ground that the defendant is a foreign corporation or a non-resident of this State, for any claim other than a debt or demand arising upon contract, judgment, or decree.

An order of attachment shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing, —

1. The nature of the plaintiff's claim;
2. That it is just;
3. The amount which the affiant believes the plaintiff ought to recover;
4. The existence of some one of the grounds for an attachment above enumerated.

When the ground of the attachment is that the defendant is a foreign corporation, or a non-resident of this State, the order of attachment may be issued without an undertaking. In all other cases, the order of attachment

[1] Compiled Statutes of Montana, 1888.

shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained.

The order of attachment requires the officer to attach the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects of the defendant.

When the plaintiff, his agent or attorney, shall make oath, in writing, that he has good reason to believe, and does believe, that any person or corporation, to be named, and within the county where the action is brought, has property of the defendant (describing the same) in his possession, if the officer cannot come at such property, he shall summon such person or corporation as garnishee; and the garnishee shall stand liable to the plaintiff for all property, moneys, and credits in his hands, or due from him to the defendant from the time he is garnished.[1]

NEVADA.

The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, in the following cases: —

I. In an action upon a contract for the direct payment of money, made, or by the terms thereof, payable in this State, which is not secured by mortgage, lien, or pledge upon real or personal property situated or being in this State, if so secured, when such security has been rendered nugatory by the act of the defendant.

II. In an action upon a contract against a defendant not residing in this State.

The clerk of the court issues the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, showing,—

1. That the defendant is indebted to the plaintiff, specifying the amount of such indebtedness over and above all legal set-offs or counter-claims, upon a contract for the direct payment of money, and that such contract was made, or is, by the terms thereof, payable in this State, and that the payment of the same has not been secured by any mortgage, lien, or pledge, upon real or personal property situate or being in this State; or, if so secured, that said security has been rendered nugatory by the act of the defendant; or,

2. That the defendant is indebted to the plaintiff, specifying the amount of such indebtedness, as near as may be, over and above all legal set-offs or counter-claims, and that the defendant is a non-resident of this State; and,

3. That the sum for which the attachment is asked is an actual *bona fide*, existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant.

[1] Compiled Statutes of Nebraska, 1889.

Before issuing the writ, the clerk shall require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, not exceeding the amount claimed by the plaintiff, in gold coin of the United States, with sufficient sureties, to the effect that if the defendant recover judgment the plaintiff will pay, in gold coin of the United States, all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

All property of the defendant, together with the interest and profits therein, and all debts due the defendant, and all other property in this State of the defendant, not exempt from execution, including rights or shares of stock in any corporation or company, are attachable, unless the defendant give security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy the plaintiff's demand, besides costs, in the money or currency of the contract.

Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, such person shall be summoned as garnishee.[1]

NEW HAMPSHIRE.

In this State the writ of attachment, as distinguished from that form of such writ known as "foreign attachment" or "trustee process," issues as a matter of course, upon the institution of any personal action. It is declared in the law to be an original process in the courts, and commands the officer to attach the goods and estate of the defendant. Under it, all property, real and personal, which is liable to be taken in execution; shares of stock in any corporation; pews and seats in meeting-houses or places of public worship; and the franchise of any corporation authorized to receive tolls, so far as relates to the rights to receive tolls, with all the privileges and immunities belonging thereto, — may be attached; but garnishees are not summoned.

Property so attached is holden until the expiration of thirty days from the time of rendering judgment in the action in favor of the plaintiff, that execution may issue thereon.

All personal actions may be commenced by the process of foreign attachment, or trustee process, except actions of replevin and trespass to the person, and actions for defamation and malicious prosecution.

This trustee writ is an attachment and summons, and is served upon the defendant and the trustees (or garnishees) in the same manner as writs of summons.

The plaintiff may insert the names of as many persons as trustees as he may deem necessary, at any time before the process is served on the defendant, but not after.

A trustee may be required to answer, in writing and under oath, interrogatories as to his liability as trustee; and every person summoned as trustee, and

[1] Baily & Hammond's General Statutes of Nevada, 1885.

having in his possession any money, goods, chattels, rights, or credits of the defendant, at the time of the service of the writ on him, or at any time after such service and before his disclosure, shall be adjudged a trustee therefor.[1]

NEW JERSEY.

If any creditor shall make oath or affirmation before any judge of any of the courts of record of this State, or justice of the peace of any county in the same, that he verily believes that his debtor absconds from his creditors, and is not, to his knowledge or belief, resident in the State at the time, the clerk of the Supreme Court, or any circuit court or court of common pleas, shall issue a writ of attachment, commanding the sheriff to attach the rights and credits, moneys and effects, goods and chattels, lands and tenements, of such debtor, wheresoever they may be found.

If the creditor be absent or reside out of the State, the oath may be made by his agent or attorney.

Attachment may also be maintained against non-resident debtors, absent or absconding females, and foreign corporations.

It issues against the heirs and devisees of a deceased debtor, in all cases in which it might lawfully have been issued against the debtor in his lifetime.

Legacies and distributive shares of estates in the hands of executors or administrators may be attached.

The personal property in this State of a non-resident is not liable to attachment in favor of a non-resident, where such property is exempt from attachment by the law of the State of which the debtor and creditor are residents.

The writ binds the rights and credits, moneys and effects, goods and chattels, of the defendant, from the time of executing the same, and his lands from the time of issuing the writ.

The officer in executing the writ is authorized and required (having first made demand and being refused) to break open any house, chamber, room, shop, door, chest, trunk, or other place or thing, where he shall be informed, or have reason to believe, any money, goods, books of account, bonds, bills, notes, papers, or writings of the defendant may be deposited, secreted, had, or found.

On the return of the writ, the clerk gives notice, for a space of not less than two and not more than three months, in one or more newspapers circulating in the State, of the attachment; and the plaintiff must set up a copy of such notice in the clerk's office, for the same space of time.

Other creditors are admitted, upon filing affidavit with the clerk of the amount of their claims.

On the return of the writ, the court appoints a fit person to audit and adjust the demands of the plaintiff, and of so many of the defendant's creditors as shall have applied to the court, or to the auditor before he shall have made his report, for that purpose. Final judgment may be entered of course, in term time or vacation, upon the report of the auditor, at any time after six months from the return of the writ.

[1] General Laws of New Hampshire, 1878.

The auditor may issue his warrant under his hand and seal, commanding the sheriff of the county, or any constable, to bring before him, at a certain time and place therein specified, the wife of the defendant, or any other person, and examine them, by word of mouth or interrogatories in writing, touching all matters relating to the trade, dealings, moneys, debts, effects, rights, credits, lands, tenements, property and estate of the defendant, and his secret grants, or fraudulent transfer or conveyance of the same; and he may also issue his warrant commanding the sheriff or constable (having first made demand and been refused) to break open any place or thing where he shall have reason to believe any moneys, goods, chattels, books of account, bonds, bills, notes, papers, or writings of the defendant may be deposited, secreted, had, or found, and to seize and inventory the same, and make report thereof to the court at the next term.

The auditor may also sue before justices of the peace for demands not exceeding one hundred dollars due the defendant.

He is required to sell the property of the defendant, real and personal. After which he must give public notice in newspapers, requiring a meeting of the plaintiff, and creditors who may have applied, at a certain time and place. At which meeting, or other subsequent one, the auditor shall distribute among the plaintiff and creditors equally, and in a ratable proportion, according to the amount of their respective debts, as ascertained by the auditor's report, and the judgment of the court thereon, all the moneys arising from the sale of the goods and chattels, lands and tenements, first deducting legal costs and charges; and, if the moneys be not sufficient to satisfy the debts, they shall assign to the plaintiff and creditors the *choses in action*, rights, and credits of the defendant, in proportion to their respective debts; which assignment shall vest the property and interest of the defendant in the assignee, so as he may sue for and recover the same in his own name and to his own use.

Any one may be summoned as a garnishee, notwithstanding his denial of having any moneys, goods, &c., of the defendant, if the plaintiff makes oath that he believes he has moneys, goods, &c., and is in fear of the garnishee's absconding before judgment and execution can be had.

When judgment is entered against the defendant by default on the report of the auditor, a *scire facias* issues against the garnishee, to appear at the next term after entry of such judgment, and show cause why the plaintiff should not have execution of the money due from him to the defendant.[1]

NEW YORK.

A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, where the action is to recover a sum of money only, as damages for one or more of the following causes: —

I. Breach of contract, express or implied, other than a contract to marry.

II. Wrongful conversion of personal property.

[1] Revision of the Statutes of New Jersey, 1877.

III. Any other injury to personal property, in consequence of negligence, fraud, or other wrongful act.

To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the judge granting the same, —

1. That one of the above causes of action exists against the defendant. If the action is to recover damages for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counter-claims known to him.

2. That the defendant is either a foreign corporation or not a resident of the State; or, if he is a natural person and a resident of this State, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed or is about to remove property from the State, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property, with the like intent.

The judge, before granting the warrant, must require a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that, if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred and fifty dollars.

It is not a defence to an action on this undertaking, that the warrant was granted improperly for want of jurisdiction, or for any other cause.

The sheriff must levy the warrant upon so much of the personal and real property of the defendant, within his county, not exempt from levy and sale under execution, as will satisfy the plaintiff's demand, with the costs and expenses. He must take into his custody all books of account, vouchers, and other papers relating to the personal property attached, and all evidences of the defendant's title to the real property attached, which he must safely keep, to be disposed of as prescribed by the law.

The real property, which may be levied on, includes any interest in real property, either vested or not vested, which is capable of being aliened by the defendant.

Under a warrant of attachment against a foreign corporation, other than a corporation created by or under the laws of the United States, the sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation, made by a person within the county; or upon one or more shares of stock therein, held by such a person, or transferred by him, for the purpose of avoiding payment thereof.

The rights or shares which the defendant has in the stock of an association or corporation, together with the interest and profits thereon, may be levied upon; and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges with respect thereto which the defendant had when they were so attached.

The attachment may also be levied upon a cause of action arising upon contract, including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due or yet to become due,

executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either within or without the State, which belongs to the defendant, and is found within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby.

Upon the application of a sheriff, holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant in the stock of the association or corporation, with all the dividends declared, or incumbrances thereon; or the amount, nature, and description of the property held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

If a person, to whom application is so made by the sheriff, refuses to give such a certificate; or if it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, or the county judge of the county to which the warrant is issued, that there is reason to suspect that a certificate given by him is untrue, or that it fails fully to set forth the facts required to be shown thereby, — the court or judge may make an order directing him to attend at a specified time, and at a place within the county to which the warrant is issued, and submit to an examination under oath concerning the same.

The sheriff must, subject to the direction of the court or judge, collect and receive all debts, effects, and things in action attached by him. He may maintain any action or special proceeding, in his own name or in the name of the defendant, which is necessary for that purpose, or to reduce to his actual possession an article of personal property capable of manual delivery, but of which he has been unable to obtain possession. And he may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs.

The sheriff must keep the property attached by him, or the proceeds of property sold, or of a demand collected by him, to answer any judgment that may be obtained against the defendant. But the court, upon the application of either party to the action, may direct the sheriff, either before or after the expiration of his term of office, to pay into court the proceeds of a demand collected, or property sold; or to deposit them in a designated bank or trust company, to be drawn out only upon the order of the court.

The plaintiff, by leave of the court or judge, may bring or maintain, in the name of himself and the sheriff jointly, by his own attorney and at his own expense, any action which might be brought by the sheriff, as aforesaid, to recover property attached, or the value thereof, or a demand attached. The sheriff must receive the proceeds of such an action; but he is not liable for the costs or expenses thereof.[1]

[1] Bliss's New York Annotated Code, 3d edition, 1890.

NORTH CAROLINA.

A warrant of attachment may be granted against the property of one or more defendants in an action, when the action is to recover a sum of money only, or damages for one or more of the following causes: —

1. Breach of contract, express or implied:

2. Wrongful conversion of personal property:

3. Any other injury to personal property, in consequence of negligence, fraud, or other wrongful act.

To entitle the plaintiff to such a warrant, he must show by affidavit to the satisfaction of the court granting the same —

1. That one of the above causes of action exists against the defendant: If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counter-claims known to him.

2. That the defendant is either —

(1) A foreign corporation; or,

(2) Not a resident of this State; or,

(3) Has departed therefrom with intent to defraud his creditors or to avoid the service of a summons; or,

(4) Keeps himself concealed therein with like intent; or,

(5) Has removed or is about to remove any of his property from this State, with intent to defraud his creditors; or,

(6) Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his property, with the like intent

Before issuing the warrant, the officer must require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred dollars.

The warrant may be levied on real property liable to execution, on tangible personal property, on rights or shares which the defendant may have in the stock of any association or corporation, and upon debts due the defendant. Such debts the officer collects and receives into his possession; to which end he may take such legal proceedings, either in his own name or in that of the defendant, as may be necessary. And garnishees may be summoned.[1]

NORTH DAKOTA.

In an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property, the plaintiff, at the time of issuing the summons or at any time afterward, may have the property

[1] The Code of North Carolina, 1883.

of the defendant attached as a security for the satisfaction of such judgment as the plaintiff may recover, in the following cases: —

1. Where the defendant is a corporation created by or under the laws of any other Territory, State, government, or country; or,

2. Is not a resident of this State; or,

3. Has absconded or concealed himself; or,

4. Is about to remove any of his property from this State; or,

5. Has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete, any of his property, with intent to defraud creditors.

The clerk of the court issues a warrant of attachment, upon the plaintiff giving affidavit and undertaking.

The affidavit must state, —

1. That a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof; and

2. That the defendant is either a foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the like intent, or that the debt was incurred from property obtained under false pretences; or,

3. That the defendant has removed or is about to remove any of his property from the State, with intent to defraud his creditors; or,

4. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his property, with the like intent.

The undertaking must be on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum named in the undertaking; which must be at least the amount of the claim specified in the affidavit, and in no case less than two hundred and fifty dollars.

Under the warrant of attachment, the sheriff must attach real and personal property, including debts, credits, money, and bank-notes; and take into his custody all books of accounts, vouchers, evidences of indebtedness, and all papers relating to the property, debts, credits, and effects of the defendant, together with all evidences of his title to real property. The rights or shares of the defendant in the stock of any association or corporation, together with the interest and profits thereon, may also be attached; and property of the defendant in the hands of third persons may be reached by garnishment.[1]

OHIO.

The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, upon the following grounds: —

[1] Compiled Laws of Territory of Dakota, 1887; continued in force in the State of North Dakota by the Constitution of that State.

1. When the defendant is a foreign corporation, or a non-resident of this State; or,

2. Has absconded with the intent to defraud his creditors; or,

3. Has left the county of his residence to avoid the service of a summons; or,

4. So conceals himself that a summons cannot be served upon him; or,

5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or,

6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

7. Has property, or rights in action, which he conceals; or,

8. Has assigned, removed, or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud his creditors; or,

9. Fraudulently or criminally contracted the debt or incurred the obligation for which suit is about to be or has been brought.

But an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this State, for any other claim than a debt or demand arising upon contract, judgment, or decree, or for causing death by a negligent or wrongful act.

An order of attachment is made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing, —

1. The nature of the plaintiff's claim;

2. That it is just;

3. The amount which the affiant believes the plaintiff ought to recover; and,

4. The existence of some one of the grounds for an attachment above enumerated.

When the ground of the attachment is, that the defendant is a foreign corporation, or a non-resident of this State, the order of attachment may be issued without an undertaking. In all other cases, it shall not be issued until there has been executed in the clerk's office, by sufficient surety of the plaintiff, to be approved by the clerk, an undertaking, in a sum equal to double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order prove to have been wrongfully obtained.

Under the order of attachment may be attached lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects of the defendant, not exempt by law from the payment of plaintiff's claim.

A creditor may obtain an attachment on a claim before it is due, —

1. When a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or,

2. Is about to make such sale, conveyance, or disposition of his property, with such fraudulent intent; or,

3. Is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts.

Garnishees may be summoned, who shall appear and answer, under oath,

all questions put to them, touching the property of every description and credits of the defendant in their possession or under their control.[1]

OREGON.

The plaintiff, at the time of issuing the summons, or any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, in the following cases: —

1. In an action upon a contract, expressed or implied, for the direct payment of money, and which is not secured by mortgage, lien, or pledge upon real or personal property, or if so secured, when such security has been rendered nugatory by the act of the defendant.

2. In an action upon a contract, expressed or implied, against a defendant not residing in this State.

A writ of attachment is issued by the clerk of the court in which the action is pending, whenever the plaintiff or any one in his behalf shall make and file an affidavit showing, —

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter-claims) upon a contract, expressed or implied, for the direct payment of money, and that the payment of the same has not been secured by any mortgage, lien, or pledge upon real or personal property; and

2. That the sum for which the attachment is asked is an actual *bona fide*, existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought nor the action prosecuted to hinder, delay, or defraud any creditor of the defendant.

Upon filing the affidavit with the clerk, the plaintiff is entitled to have the writ issue upon his filing with the clerk his undertaking, with one or more sureties, in a sum not less than one hundred dollars, and equal to the amount for which the plaintiff demands judgment, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking.

Under the writ may be attached the rights or shares which the defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property of the defendant not exempt from execution; and garnishees may be summoned.[2]

PENNSYLVANIA.

In this State there is foreign attachment, domestic attachment, and a third description which has no distinctive designation.

I. The writ of foreign attachment issues, as a matter of right, against a foreign corporation, and against a person not residing within the State, and

[1] Smith & Benedict's Verified Revised Statutes of Ohio, 1890.

[2] Hill's Annotated Laws of Oregon, 1887.

not being within the county where the writ issues, at the time of its issue. Under it real and personal estate may be attached, and garnishees summoned, who are required to answer interrogatories propounded by the plaintiff. The benefit of the writ of foreign attachment inures to the attaching creditor alone, and not to all of the defendant's creditors, as in the case of domestic attachment.

II. The writ of domestic attachment issues against any debtor, being an inhabitant of the State, if such debtor shall have absconded from the place of his usual abode within the same, or shall have remained absent from the State, or shall have confined himself in his own house, or concealed himself elsewhere, with design, in either case, to defraud his creditors. And the like proceedings may be had if a debtor, not having become an inhabitant of the State, shall confine or conceal himself within the county, with intent to avoid the service of a process, and to defraud his creditors.

This writ does not issue, except upon oath or affirmation, previously made by a creditor or by some person in his behalf, of the truth of his debt, and of the facts upon which the attachment shall be founded. It commands the officer to attach the goods and chattels, lands and tenements, of the defendant, and to summon garnishees.

Upon the writ being executed, the court appoints three trustees, to whom the officer delivers the personal property attached; and the trustees thereupon publish notice in a newspaper, requiring all persons indebted to the defendant, or holding property belonging to him, to pay and deliver the same to them, and also desiring all creditors of the defendant to present their respective accounts or demands.

All the estate of the defendant attached or afterwards discovered by the trustees vests in the trustees, and they may sue for and recover the same in their own names. They are authorized to summon all persons residing in the county, supposed to be indebted to the defendant, and examine them on oath, as they shall think fit, touching the real or personal estate of the defendant, and such other things as may tend to disclose their estates, or their secret grants, or alienation of their effects. If such persons reside in another county, the trustees may send interrogatories in writing, and examine them to the same effect.

The trustees may issue warrants commanding houses, chambers, shops, stores, and warehouses of the defendant to be broken open, and any trunks or chests of the defendant, in which his goods or effects, books of account, or papers relating to his estate shall be, or shall be reputed to be, to be seized for the benefit of his creditors.

They are empowered to recover any property fraudulently disposed of by the defendant, and they may redeem mortgaged property.

They are authorized to sell the estate, real and personal, of the defendant which has become vested in them, and to assign any or all of the debts due or to become due to him; and the purchaser or grantee may sue for and recover such property or debts, in his own name and to his own use.

The trustees then fix a day, and proceed to hear the proofs of all creditors of the defendant of their respective claims; and having stated their accounts, and ascertained the proportionate sum payable to each creditor, they file their

report of the same in the office of the prothonotary; and, if no exceptions to the report be filed within a limited time, they proceed to distribute the money, ratably and without preference, among all the creditors who have proved their claims.

The death of the defendant after the issuing of an attachment does not abate or otherwise affect the proceedings thereon.

No second or other attachment can be issued against or served upon the estate or effects of the same defendant, except those issued into another county, unless the first attachment be not executed, or be dissolved by the court.

III. On the 17th of March, 1869, a law was enacted in this State extending the remedy by attachment.

Under this law, an attachment issues by the prothonotary of a court of record against any defendant, upon proof by the affidavit of the plaintiff, or any other person for him, that the defendant is justly indebted to him in a sum exceeding one hundred dollars, and setting forth in the affidavit the nature and amount of the indebtedness, and that, —

1. The defendant is about to remove his property out of the jurisdiction of the court in which the attachment is applied for, with intent to defraud his creditors; or,

2. Has property, rights in action, or interest in any public or corporate stock, money, or evidences of debt, which he fraudulently conceals; or,

3. Has assigned, disposed of, or removed, or is about to assign, dispose of, or remove, any such property, money, rights in action, interest in public or corporate stock, or evidences of debt, with the intent to defraud his creditors; or,

4. Fraudulently contracted the debt or incurred the obligation for which the plaintiff's claim is made.

Before the writ issues under this act, the plaintiff, or some one on his behalf, must execute and file with the prothonotary a bond, in a penalty of at least double the amount claimed, with good and sufficient surety, to be approved by the prothonotary or one of the judges of the court of common pleas of the county, conditioned that if the plaintiff shall fail to prosecute his action with effect, and recover a judgment against the defendant, he shall pay the defendant all legal costs and damages which he may sustain by reason of the attachment.

If two or more attachments are issued against the same defendant, the one first in the hands of the proper officer for service has the prior lien, and the others, issued in pursuance of this act, in the order of time in which they are issued to the officer.[1]

RHODE ISLAND.

An original writ of attachment, commanding the attachment of the real or personal estate of the defendant, including his personal estate in the hands or possession of another person as trustee of the defendant, and his stock or shares

[1] Brightly's Purdon's Digest of Pennsylvania Laws, 11th Edition, 1885.

in any banking association or other incorporated company, may be issued by the Supreme Court, court of common pleas, or by any justice court, whenever the plaintiff, his agent or attorney, shall make affidavit, to be indorsed thereon or annexed thereto, that the plaintiff has a just claim against the defendant that is due, upon which the plaintiff expects to recover in such action a sum sufficient to give jurisdiction to the court in which the writ is returnable; and, also,

1. That the defendant is an incorporated company established out of this State: or,

2. Resides out of this State; or,

3. Has left the State, and is not expected by the affiant to return within the same in season to be served with process returnable to the next term of the court; or,

4. Has committed fraud in contracting the debt upon which the action is founded, or in the concealment of his property, or in the disposition thereof; or,

5. That, since the contracting of such debt, the defendant has been the owner of property, or in the receipt of an income, which he has refused or neglected to apply towards the payment thereof, though requested by the plaintiff so to do.

A writ of attachment may be issued in an action already commenced by summons, in the like cases, and on the like affidavit, as in the case of an original writ of attachment.

The writ commands the attachment of the goods and chattels of the defendant, and his real estate, and his personal estate in the hands of another person as his trustee, and his stock or shares in any banking association or incorporated company.

Under the writ, garnishees may be summoned, and must answer under oath.[1]

SOUTH CAROLINA.

In any action arising for the recovery of money, or for the recovery of property, whether real or personal, and damages for the wrongful conversion and detention of personal property, or in an action for the recovery of damages for injury done to either person or property; the plaintiff, at the time of issuing the summons, or any time afterwards, may have the property of the defendant attached, as a security for the satisfaction of such judgment as the plaintiff may recover, in any of the following cases: —

1. Where the defendant is a corporation created by or under the laws of any other State, government, or country; or,

2. Is not a resident of this State; or,

3. Has absconded or concealed himself; or,

4. Is about to remove any of his property from this State; or,

5. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his property, with intent to defraud creditors.

[1] Public Statutes of Rhode Island, 1882.

To obtain an attachment, it is necessary that it should appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim, and the grounds thereof, and that one or other of the said grounds for attachment exists; and that a written undertaking should be filed, on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars, except in case of a warrant issued by a trial justice, when it shall be at least twenty-five dollars.

All real and personal estate, including money and bank-notes, except such real and personal estate as is exempt from attachment, levy, or sale by the Constitution; and all books of account, vouchers, and papers relating to the property, debts, credits, and effects of the debtor, together with all evidences of his title to real estate, may be levied upon under attachment.

Rights or shares in the stock of any corporation may be attached.

The execution of the attachment upon any such rights or shares, or upon any debts or other property incapable of manual delivery, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on; and such person shall furnish the officer with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to, the defendant. And this may be compelled by attachment of the body.[1]

SOUTH DAKOTA.

The legislature of this State enacted the laws of the Territory of Dakota *en masse*.

The attachment law of that Territory which thus became the law of South Dakota, may be found under North Dakota, *ante*.

TENNESSEE.

Any person having a debt or demand due at the commencement of an action or having a claim for damages for a tort; or a plaintiff after action for any cause has been brought, and either before or after judgment, may sue out an attachment at law or in equity against the property of a debtor or defendant, in the following cases: —

1. Where the debtor or defendant resides out of the State; or,

2. Is about to remove or has removed himself or property from the State; or,

[1] Code of Civil Procedure of South Carolina, 1881–82.

3. Has removed or is removing himself out of the county privately; or,

4. Conceals himself so that the ordinary process of law cannot be served upon him; or,

5. Absconds, or is absconding or concealing himself or property; or,

6. Has fraudulently disposed of, or is about fraudulently to dispose of, his property; or,

7. Where any person liable for any debt or demand, residing out of the State, dies, leaving property in the State.

When the debtor and creditor are both non-residents of this State, and residents of the same State, the creditor cannot have an attachment against the property of the debtor, unless he swear that the property of the debtor has been fraudulently removed to this State to evade the process of law in the State of their domicile or residence.

An attachment may be sued out upon debts or demands not due, in any of the cases above enumerated, except the first.

Any accommodation indorser or surety may sue out an attachment against the property of his principal, as a security for his liability, whether the debt on which he is bound be due or not; but the attachment in such case shall be discharged, if the principal give bond and security to be approved by the court in term time, or its clerk in vacation, to indemnify the plaintiff.

To obtain an attachment, the plaintiff, his agent or attorney, must make oath in writing, stating the nature and amount of the debt or demand, and that it is a just claim, and, also, that one or more of the above enumerated causes for attachment exists; and two or more causes may be stated in the alternative.

The plaintiff, his agent or attorney, must, before the writ issues, execute a bond in double the amount claimed to be due, with sufficient security, payable to the defendant, and conditioned that the plaintiff will prosecute the attachment with effect, or, in case of failure, pay the defendant all costs that may be adjudged against him, and also all such damages as he may sustain by the wrongful suing out of the attachment.

Attachments may be levied upon any real or personal property of either a legal or equitable nature, debts, or *choses in action*, whether due or not, in which the defendant has an interest; and garnishees may be summoned.[1]

TEXAS.

Original attachments are issued, upon the plaintiff, his agent or attorney, making an affidavit in writing, stating that the defendant is justly indebted to the plaintiff, and the amount of the demand, and that the defendant, —

1. Is not a resident of the State, or is a foreign corporation, or is acting as such; or,

2. Is about to remove permanently out of the State, and has refused to pay or secure the debt due the plaintiff; or,

3. Secretes himself so that the ordinary process of law cannot be served on him; or,

[1] Milliken & Vertrees' Code of Tennessee, 1884.

4. Has secreted his property for the purpose of defrauding his creditors; or,

5. Is about to secrete his property for the purpose of defrauding his creditors; or,

6. Is about to remove his property out of the State, without leaving sufficient remaining for the payment of his debts; or,

7. Is about to remove his property, or a part thereof, out of the county where the suit is brought, with intent to defraud his creditors; or,

8. Has disposed of his property, in whole or in part, with intent to defraud his creditors; or,

9. Is about to dispose of his property with intent to defraud his creditors; or,

10. Is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; or,

11. That the debt is due for property obtained under false pretences.

The affidavit must further state, 1. That the attachment is not sued out for the purpose of injuring or harassing the defendant; and 2. That the plaintiff will probably lose his debt unless the attachment is issued.

Before the issue of the attachment, the plaintiff, his agent or attorney, must execute a bond, with two or more good and sufficient sureties, payable to the defendant, in at least double the debt sworn to be due, conditioned that the plaintiff will prosecute his suit to effect, and pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment.

The writ of attachment goes against the property of the debtor, wherever the same may be found.

It may issue in all cases, although the debt or demand be not due; but no judgment shall be rendered until the demand becomes due.

Writs of garnishment may be issued, —

1. Where an original attachment has been issued as above provided: and

2. Where the plaintiff sues for a debt, and makes affidavit that such debt is just, due, and unpaid, and that the defendant has not, within this State, subject to execution, sufficient to satisfy such debt; and that the garnishment applied for is not sued out to injure either the defendant or the garnishee.

3. Where the plaintiff has a judgment, and makes affidavit that the defendant has not, within his knowledge, property in his possession within this State, subject to execution, sufficient to satisfy such judgment.

In the second case specified in this connection the plaintiff must execute a bond, with two or more sufficient sureties, to be approved by the officer issuing the writ, payable to the defendant in the suit, in double the amount of the debt claimed therein, conditioned that he will prosecute his suit to effect and pay all damages and costs that may be adjudged against him for wrongfully suing out such garnishment.

Before the issue of the writ of garnishment the plaintiff must make application therefor in writing, under oath, signed by him, stating the facts authorizing the issue of the writ, and that he has reason to believe, and does believe, that the garnishee, stating his name and residence, is indebted to the defendant; or that he has in his hands effects belonging to the defendant, or that the garnishee is an incorporated or joint stock company, and that the defendant is the owner of shares in such company, or has an interest therein.[1]

[1] Sayles' Revised Civil Statutes of Texas, 1887.

VERMONT.

The ordinary mode of process in civil causes is by writ of summons or attachment.

Writs of attachment may issue against the goods, chattels, or estate of the defendant, and for want thereof against his body.

No writ shall issue unless there be sufficient security given to the defendant, by way of recognizance, by some person other than the plaintiff, to the satisfaction of the authority signing the writ, that the plaintiff shall prosecute his writ with effect, and shall answer all damages, if judgment be rendered against him.

Actions founded on a contract, express or implied, made and entered into since the first day of January, 1839, actions of account, book account, and actions founded on a contract where the defendant has absconded from, or is resident out of, this State, or is concealed within this State, may be commenced by trustee process

The writ in such case authorizes the attachment of the goods, chattels, or estate of the defendant in his own hands, and also any goods, effects, or credits in the hands of the trustees.

Every person having any goods, effects, or credits of the defendant intrusted or deposited in his hands or possession, or which shall come into his hands or possession after the service of the writ and before disclosure is made, may be summoned as a trustee; and such goods, effects, and credits shall thereby be attached, and held to respond to the final judgment in the suit. Whatever any trustee may have of the defendant's in his hands or possession, which he holds against law or equity, may be attached by this process.

Negotiable paper, under or over due, may be attached by the trustee process, and shall be subject to the operation of the trustee process, unless it appear that the same had been negotiated, and notice thereof given to the maker or indorser before the service of the trustee process on him. But negotiable paper, actually assigned, negotiated, and transferred to any bank, savings bank, trust company, or insurance company, in the State, before it becomes due, shall be exempt from attachment by trustee process.

Any debt or legacy due from an executor or administrator, and any other goods, effects, or credits in the hands of an executor or administrator, as such, may be attached in his hands by the trustee process.

All corporations may be summoned as trustees.

Any money or other thing due to the defendant may be attached by the trustee process before it has become payable, provided it be due absolutely and without any contingency; but the trustee shall not be compelled to pay or deliver it before the time appointed therefor by the contract.

Trustees may be examined on oath, touching the effects, &c., of the defendant in their hands: but the answer of a trustee under oath is not conclusive in deciding how far he is chargeable; but either party may allege and prove any facts that may be material in deciding that question.[1]

[1] Revised Laws of Vermont, 1880.

VIRGINIA.

If at the time of or after the institution of any action at law for the recovery of specific personal property, or a debt, or damages for the breach of a contract, express or implied, or damages for a wrong, the plaintiff, his agent or attorney, shall make affidavit, stating that the plaintiff's claim is believed to be just, and, where the action is to recover specific personal property, the nature, and, according to the affiant's belief, the value of such property, and the probable amount of damages the plaintiff will recover for the detention thereof, and where it is to recover a debt or damages for the breach of a contract, express or implied, or damages for a wrong, a certain sum which (at the least) the affiant believes the plaintiff is entitled to or ought to recover, and stating also the existence, to the best of the affiant's belief, of one or more of the following grounds of attachment; the clerk of the court shall issue an attachment.

The grounds of attachment are that the defendant —

1. Is a foreign corporation, or is not a resident of this State, and has estate or debts owing to said defendant within the county or corporation in which the action is, or is sued with a defendant residing therein; or,

2. Is removing or about to remove out of this State, with intent to change his domicile; or,

3. Is removing, intends to remove, or has removed the specific property sued for, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this State, so that process of execution on a judgment, when obtained in said action, will be unavailing; or,

4. Is converting, or is about to convert, or has converted, his property of whatever kind, or some part thereof, into money, securities, or evidences of debt, with intent to hinder, delay, or defraud his creditors; or,

5. Has assigned or disposed of, or is about to assign or dispose of, his estate, or some part thereof, with intent to hinder, delay, or defraud his creditors.

If the action be for specific personal property, the attachment may be against such property and against the defendant's estate for so much as is sufficient to satisfy the probable damages for its detention, or, at the option of the plaintiff, against the defendant's estate for the value of such specific property and the damages for its detention. If the action be to recover a debt, or damages for the breach of a contract, express or implied, or damages for a wrong, the attachment shall be against the defendant's estate for the amount specified in the affidavit as that which the affiant believes the plaintiff is entitled to or ought to recover.

Attachments (except where sued out specially against specified property) may be levied on any estate, real or personal, of the defendant, and garnishees may be summoned, who are required to answer under oath.[1]

[1] Code of Virginia, 1887.

WASHINGTON.

The plaintiff, at the time of issuing the summons, or at any time afterward and before judgment, may have the property of the defendant attached, as a security for the satisfaction of such judgment as he may recover.

A writ of attachment is issued by the clerk of the court in which the action is pending, whenever the plaintiff, or any one on his behalf, makes and files an affidavit, and gives a bond; the affidavit to allege that a cause of action exists against the defendant, in favor of the plaintiff, and the nature thereof, and that the defendant is indebted to the plaintiff thereon, specifying the amount of said indebtedness, as near as may be, over and above all set-offs and counter-claims, and that the same is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or if originally so secured, such security has, without any act of the plaintiff's, become inadequate.

The bond is to be given by the plaintiff, with two or more sureties, in the sum of not less than two hundred dollars, and equal to the amount for which the plaintiff demands judgment; conditioned that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, should the same be wrongful or oppressive.

All property of the defendant, not exempt from execution, may be attached, including his rights and shares in the stock of any association or corporation,' together with the interest and profits thereon; and garnishees may be summoned.[1]

WEST VIRGINIA.

When any action at law or suit in equity is about to be or is instituted for the recovery of any claim or debt arising out of contract, or to recover damages for any wrong, the plaintiff, at the commencement of the action or suit, or at any time thereafter, and before judgment, may have an order of attachment against the property of the defendant, on filing with the clerk of the court his own affidavit, or that of some credible person, stating the nature of the plaintiff's claim and the amount the affiant believes the plaintiff is justly entitled to recover in the action; and also that the affiant believes that some one or more of the following grounds exist for such attachment: —

1. That the defendant, or one of the defendants, is a foreign corporation, or is not a resident of this State; or,

2. Has left or is about to leave the State, with intent to defraud his creditors; or,

3. So conceals himself that a summons cannot be served upon him; or,

4. Is removing, or is about to remove, his property (or the proceeds of the sale of his property, or a material part of such property or proceeds) out of this State, so that process of execution on a judgment or decree in such action or suit, when it is obtained, will be unavailing; or,

[1] Code of Washington, 1881.

5. Is converting, or is about to convert, his property, or a material part thereof, into money or securities, with intent to defraud his creditors; or,

6. Has assigned or disposed of his property, or a material part thereof, or is about to do so, with intent to defraud his creditors; or,

7. Has property, or rights of action, which he conceals; or,

8. Fraudulently contracted the debt or incurred the liability for which the action or suit is brought.

Unless the attachment is sued out upon the first of those grounds, the affiant shall also state, in his affidavit, the material facts relied on by him to show the existence of the grounds upon which his application for the attachment is based.

Every attachment may be levied upon any estate, real or personal, of the defendant; and the plaintiff may, by an indorsement on the order of attachment, designate any person as being indebted to, or having in his possession, the effects of the defendant; and such person may be summoned as garnishee.

If the plaintiff shall, at the time of suing out the attachment, give bond, with security approved by the clerk, in a penalty of at least double the amount of the claim sworn to, with condition to pay all costs and damages which may be awarded against him, or sustained by any person by reason of the suing out of the attachment, and to pay to any claimant of any property seized or sold under or by virtue of the attachment all damages which he may recover in consequence of such seizure or sale; and also to warrant and defend to any purchaser of the property such estate or interest therein as is sold; the officer shall take possession of the property levied on by virtue of the attachment.[1]

WISCONSIN.

Any creditor is entitled to proceed by attachment.

In order to obtain an attachment, the plaintiff, or some person in his behalf, must make an affidavit, stating that the defendant is indebted to the plaintiff, and specifying the amount of such indebtedness, as near as may be, over and above all legal set-offs, and that the same is due upon contract, express or implied, or upon judgment or decree, and that the deponent knows, or has good reason to believe, either, —

1. That the defendant has absconded or is about to abscond from this State, or is concealed therein to the injury of his creditors, or keeps himself concealed therein, with intent to avoid the service of a summons; or,

2. Has assigned, conveyed, disposed of, or concealed, or is about to assign, convey, dispose of, or conceal, his property, or any part thereof, with intent to defraud his creditors; or,

3. Has removed or is about to remove any of his property out of this State, with intent to defraud his creditors; or,

4. Fraudulently contracted the debt or incurred the obligation respecting which the action is brought; or,

5. Is not a resident of this State; or,

[1] Code of West Virginia, 1887.

6. Is a foreign corporation; or, if created under the laws of this State, that all the proper officers on whom to serve the summons do not exist, are non-residents of the State, or cannot be found; or,

7. That the action is brought against the defendant, as principal upon an official bond, to recover money due the State, or some county or other municipality therein, or that the action is brought against the defendant as principal, upon a bond or other instrument given as evidence for, or to secure the payment of money embezzled or misappropriated by such defendant and while acting as an officer of the State, or of any county or municipality therein.

An attachment may also be obtained on an affidavit showing that a cause of action sounding in tort exists in favor of the plaintiff against the defendant, that the damages sustained and claimed exceed fifty dollars, and

1. That the defendant is not a resident of this State, or that his residence is unknown, and cannot with due diligence be ascertained; or,

2. That the defendant is a foreign corporation.

Before the writ of attachment shall be executed, a written undertaking on the part of the plaintiff, with sufficient surety, shall be delivered to the officer, to the effect that, if the defendant recover judgment, the plaintiff shall pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the writ of attachment, not exceeding the sum specified in the undertaking, which sum shall not be less than two hundred and fifty dollars.

The writ authorizes the attachment of all property of the defendant, including rights or shares of any association or corporation.

Any creditor is entitled to proceed by garnishment against any person (except a municipal corporation) who shall be indebted to, or have any property whatever, whether real or personal, in his possession or under his control, belonging to, such creditor's debtor. In order thereto, either at the time of issuing the summons, or at any time thereafter before final judgment, in any action to recover damages founded upon contract, express or implied, or upon judgment or decree, or at any time after the issuing, in any case, of an execution against property, and before the time when it is returnable, the plaintiff, or some person in his behalf, may make an affidavit, stating that he verily believes that some person, naming him, is indebted to, or has property, real or personal, in his possession, or under his control, belonging to the defendant in the action or execution, naming him, and that such defendant has not property liable to execution, sufficient to satisfy the plaintiff's demand; and that the indebtedness or property mentioned in such affidavit is, to the best of the knowledge and belief of the affiant, not by law exempt from seizure or sale upon execution.[1]

WYOMING.

The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, upon the following grounds: —

[1] Sanborn & Berryman's Annotated Statutes, of Wisconsin, 1889.

1. When a defendant is a foreign corporation, or a non-resident of this State, or is about to become a non-resident; or,

2. Has absconded, with intent to defraud his creditors; or,

3. Has left the county of his residence to avoid the service of a summons; or,

4. So conceals himself that a summons cannot be served upon him; or,

5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or,

6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

7. Has property, or rights in action, which he conceals; or,

8. Has assigned, removed, or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud his creditors; or,

9. Fraudulently or criminally contracted the debt or incurred the obligation for which suit is about to be or has been brought; or,

An order of attachment is made by the clerk of the court in which the action is brought, where there is filed in his office an affidavit of the plaintiff, his agent or attorney, stating, —

1. The nature of the plaintiff's claim;

2. That it is just;

3. The amount which the affiant believes the plaintiff ought to recover;

4. The existence of some one of the above-enumerated grounds for an attachment, or that the affiant has good reason to believe and does believe that some one of those grounds (stating what one) exists.

The order of attachment shall not be issued until there has been executed in the clerk's office, by sufficient surety of the plaintiff, to be approved by the clerk, an undertaking, in a sum equal to double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay all damages which the defendant may sustain by reason of the attachment, if the order prove to have been wrongfully obtained.

All property of the defendant, including rights or shares in the stock of any corporation or company, together with the interest and profits therein, and all debts due the defendant, may be attached; and garnishees may be summoned.[1]

TERRITORY OF ARIZONA.

The judges and clerks of the district courts and justices of the peace may issue writs of original attachment, upon the plaintiff, his agent, or attorney, making an affidavit in writing, stating one or more of the following grounds:

1. That the defendant is justly indebted to the plaintiff, and the amount of the demand; and

2. That the defendant is not a resident of the Territory, or is a foreign corporation, or is acting as such; or,

3. That he is about to remove permanently out of the Territory, and has refused to pay or secure the debt due the plaintiff; or,

[1] Revised Statutes of Wyoming, 1887.

4. That he secretes himself, so that the ordinary process of law cannot be served on him; or,

5. That he has secreted his property, for the purpose of defrauding his creditors; or,

6. That he is about to secrete his property for the purpose of defrauding his creditors; or,

7. That he is about to remove his property out of the Territory, without leaving sufficient remaining for the payment of his debts; or,

8. That he is about to remove his property, or a part thereof, out of the county where the suit is brought, with intent to defraud his creditors; or,

9. That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or,

10. That he is about to dispose of his property with intent to defraud his creditors; or,

11. That he is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

12. That the debt is due for property obtained under false pretences.

The affidavit shall further state —

1. That the attachment is not sued out for the purpose of injuring or harassing the defendant; and,

2. That the plaintiff will probably lose his debt unless such attachment is issued.

Before the issue of the attachment the plaintiff must execute a bond, with two or more good and sufficient sureties, payable to the defendant, in a sum not less than double the debt sworn to be due, conditioned that the plaintiff will prosecute his suit to effect, and will pay all such damages and costs as shall be adjudged against him, for wrongfully suing out such attachment.[1]

TERRITORY OF NEW MEXICO.

Creditors whose demands amount to one hundred dollars or more may sue their debtors in the district court, by attachment in the following cases: —

1. When the debtor is not a resident of, nor resides in, this Territory; or,

2. Has concealed himself, or absconded or absented himself from his usual place of abode in this Territory, so that the ordinary process of law cannot be passed upon him; or,

3. Is about to remove his property or effects out of this Territory; or has fraudulently concealed or disposed of his property or effects, so as to defraud, hinder, or delay his creditors; or,

4. Is about fraudulently to convey or assign, conceal or dispose of, his property or effects, so as to hinder, delay, or defraud his creditors; or,

5. When the debt was contracted out of this Territory, and the debtor has absconded, or secretly removed his property or effects into the Territory, with the intent to hinder, delay, or defraud his creditors.

6. Where the defendant is a corporation whose principal office or place of business is out of this Territory, unless such corporation shall have a desig-

[1] Revised Statutes of Arizona, 1887.

nated agent in the Territory, upon whom service of process may be made in suits against the corporation.

7. Where the defendant fraudulently contracted the debt or incurred the obligation respecting which the suit is brought, or obtained credit from the plaintiff by false pretences, an attachment may issue on a demand not yet due in any case where an attachment is authorized, in the same manner as upon demands already due.

In order to obtain an attachment, an affidavit must be made by the plaintiff, or some person for him, and a bond executed.

The affidavit must state that the defendant is justly indebted to the plaintiff, after allowing all just credits and off-sets, in a sum to be specified, and on what account; and that the affiant has good reason to believe, and does believe, the existence of one or more of the causes above recited as entitling the plaintiff to sue by attachment.

The bond must be executed by the plaintiff or some responsible person as principal, and two or more securities, residents of the Territory, in a sum at least double the amount sworn to, payable to this Territory; conditioned that the plaintiff shall prosecute his action without delay and with effect, and refund all sums of money that may be adjudged to be refunded to the defendant, and pay all damages that may accrue to any defendant or garnishee by reason of the attachment, or any process or judgment thereon. This bond may be sued on in the name of the Territory, by any party injured.

The writ of attachment commands the sheriff to attach the defendant, by all and singular his lands and tenements, goods, moneys, effects, and credits, in whosesoever hands they may be found; and under it garnishees may be summoned, who are required to answer on oath written allegations and interrogatories.

Notice of garnishment shall have the effect of attaching all personal property, money, rights, credits, bonds, bills, notes, drafts, checks, or other *choses in action*, due or to become due from the garnishee to the defendant, or belonging to the defendant and in the garnishee's possession or charge, or under his control, at the time of the service of the garnishment, or which may come into his possession or charge, or under his control, or for or on account of which he may become indebted to the defendant, between that time and the time of filing his answer.

Any debt or legacy due or to become due by an executor or administrator, or any goods, effects, or credits in the hands of an executor or administrator as such, may be attached in his hands by process of garnishment; and in like manner, money, effects, or credits due or belonging, or to become due, to an executor or administrator as such, may be attached in the hands of the debtor or person holding the same.[1]

TERRITORY OF UTAH.

In an action upon a judgment, or upon a contract, express or implied, which is not secured by mortgage or lien upon real or personal property situated or

[1] Compiled Laws of New Mexico, 1884.

being in this Territory, or if originally so secured, when such security has, without any act of the plaintiff or of the person to whom the security was given, become valueless, the plaintiff may, at the time of issuing the summons, or at any time afterward, have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment. The cases in which an attachment may be issued are, where the defendant —

1. Is not residing in this Territory; or,

2. Stands in defiance of an officer, or conceals himself so that process cannot be served upon him; or,

3. Has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property with intent to defraud his creditors; or,

4. Has departed, or is about to depart from the Territory to the injury of his creditors; or,

5. Fraudulently contracted the debt or incurred the obligation, respecting which the action is brought.

The clerk of the court issues the writ of attachment, upon receiving an affidavit by or on behalf of the plaintiff setting forth: —

That the defendant is indebted to the plaintiff, specifying the amount of such indebtedness as near as may be, over and above all legal set-offs or counter-claims, and whether upon a judgment or an express or implied contract, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, situate and being in this Territory; or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; and that the same is an actual *bona fide* existing demand due and owing from the defendant to the plaintiff; and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant; and also specifying one or more of the causes of attachment above set forth.

Before issuing the writ, the clerk shall require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that, if the defendant recover judgment, or if the attachment be wrongfully issued, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Under the writ, all descriptions of property may be attached, including rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits therein, and all debts due the defendant; and garnishees may be summoned and charged, not only on account of their own debt to the defendant, but on account of credits in their hands belonging to him.[1]

[1] Compiled Laws of Utah, 1888.

DISTRICT OF COLUMBIA.

This District now comprises only so much of the original ten miles square, as was ceded by the State of Maryland to the United States; within which, by the terms of the act of Congress of February 27, 1801, "*concerning the District of Columbia*" (2 U. S. Statutes at Large, 103), the laws of Maryland, as they existed on that day, were continued in force.

At that time the Maryland Statute of 1795, ch. 56, was in force, the first section of which was, as follows:

"If any person whatsoever, not being a citizen of this State, and not residing therein, shall or may be indebted unto a citizen of this State, or of any other of the United States, or if any citizen of this State, being indebted unto another citizen thereof, shall actually run away, abscond, or fly from justice, or secretly remove him or herself from his or her place of abode, with intent to evade the payment of his or her just debts, such creditor may, in either case, make application to any judge of the general court, justice of the county court, or justice of the peace; and on the oath or affirmation of such creditor, made before any judge of the general court, justice of the county court, or justice of the peace of this State, or before any judge of any other of the United States, that the said debtor is *bona fide* indebted to him or her in the sum of ———, over and above all discounts, and at the same time producing the bond or bonds, bill or bills, protested bill or bills, of exchange, promissory note or notes, or other instrument or instruments of writing, account or accounts, by which the said debtor is so indebted, and also, in the case of the debtor not being a citizen of this State, on the oath or affirmation of the said creditor made as aforesaid, that he or she doth know, or is credibly informed and verily believes, that the said debtor is not a citizen of this State, and that he or she doth reside therein, and also (in the case of the debtor being a citizen of this State), on the oath or affirmation of the said creditor made as aforesaid, that he or she doth know, or is credibly informed and verily believes, that the said debtor is actually run away or fled from justice, or removed from his or her place of abode, with the intent to injure and defraud his or her creditor or creditors, the said judge of the general court, justice of the county court, or justice of the peace, shall be, and he is hereby fully authorized and required forthwith to issue his warrant to the clerk of the general or of the county court, as the case may require, to issue an attachment or attachments against the lands, tenements, goods, chattels, and credits of the said debtor; upon the receipt of which warrant, together with the proofs on which the same was granted, and not otherwise, the clerk of the general or of the county court (as the case may require), shall issue such attachment or attachments, in which there shall be the same clause of *scire facias* as by the act to which this is a supplement is directed to be inserted in attachments awarded by either of the said courts, and the like process and proceedings shall and may be had thereon as are required and prescribed by the said act upon attachments awarded as aforesaid."

This law is still in force in the District of Columbia, except so far as it is modified by an act of Congress, passed June 1, 1866, in the following terms:

"That writs of attachment and garnishments shall be issued by the clerk of the supreme court of the District, without any authority or warrant from any judge or justice, whenever the plaintiff, his agent or attorney, shall file in the clerk's office, whether at the commencement or during the pendency of the suit, an affidavit, supported by the testimony of one or more witnesses, showing the grounds upon which he bases his affidavit, and also setting forth that the plaintiff has a just right to recover against the defendant what he claims in the declaration, and also stating either, first, that the defendant is a non-resident of the District; or, second, that the defendant evades the service of ordinary process by concealing himself or by withdrawing from the District temporarily; or, third, that he has removed or is about to remove some of his property from the District, so as to defeat just demands against him; and shall also file his (the plaintiff's) undertaking, with sufficient surety or sureties, to be approved by the clerk, to make good all costs and damages which the defendant may sustain by reason of the wrongful suing out of the attachment" (14 U. S. Statutes at Large, 54).

ATTACHMENTS

IN

UNITED STATES CIRCUIT AND DISTRICT COURTS.

The following are Sections 915 and 916 of the Revised Statutes of the United States:—

§ 915. In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held, for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held, in relation to attachments and other process; *Provided*, That similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy.

§ 916. The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

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